Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 23 MAY 24, 1989 No. 21

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 89–57)

STATEMENT OF POSITION—ISSUANCE OF SHOW CAUSE LETTERS AND SANCTION ACTIONS AGAINST DELINQUENT SURETIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Statement of position.

SUMMARY: Surety companies have asked for clarification concerning Customs interpretation of 19 CFR 113.38(c)(1) which sets out the actions which may be taken against a surety which is significantly delinquent in the number of outstanding bills or the dollar amounts thereof. Any actions taken against a surety regarding nonacceptance of bonds are initiated only after the surety has failed to respond to numerous demand notices and bills which have been issued. The surety then has the opportunity to come forward in response to a show cause letter and either settle the cases, provide justification for the failure to pay, or demonstrate the existence of significant legal issues justifying further delay (19 CFR 113.38(a)).

To promote uniformity and equitable treatment of sureties nationwide, Customs Headquarters has set thresholds for the issuance of show cause letters to sureties and eventual nonacceptance of bonds at the district or regional level if a satisfactory response is not provided to a show cause letter. The thresholds are the minimum number of cases and/or dollar amounts at which a district or region would consider possible sanction action against a surety. These, of course, are not requirements that districts and regions must initiate show cause letters when the thresholds are reached. Moreover, in all previous sanction cases, the number and dollar amounts of the delinquent cases far exceeded these thresholds. It is our belief that these thresholds are reasonable for meeting the requirement in 19 CFR 113.38 of "significantly delinquent." They are as follows:

District level: 10 cases and/or $25,000 for consideration of show cause letters;

Regional level: 40 cases and/or $100,000 for consideration of show cause letters.

It is the position of the Customs Service that show cause letters and possible sanction action should be necessary only in exceptional cases. Sureties are provided with more than adequate opportunity to petition and settle cases during the case processing cycle.

Dated: May 4, 1989.

D. LYNN GORDON,
Assistant Commissioner,
Office of Commercial Operations.

---

19 CFR Part 4

(T.D. 89–58)

CUSTOMS REGULATIONS AMENDMENT RELATING TO UNIQUE BILL OF LADING IDENTIFIER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: By a final rule published as T.D. 88–69 in the Federal Register on October 26, 1988 (53 FR 43197), section 4.7a, Customs Regulations (19 CFR 4.7a), was amended to require that each bill of lading accompanying a shipment of cargo carried by vessel be identified by a unique identifier containing not more than 16 characters, the first four of which must consist of a Standard Carrier Alpha Code (SCAC) assigned to and specifically identifying each carrier or other issuer of bills of lading. The remaining 12 characters could be either alpha or numeric, but when both were used the alpha characters had to be placed either in the first or last positions and not commingled with the numeric characters.

This document amends § 4.7a, as amended by T.D. 88–69, so as to effectively give the carrier or other issuer the option of commingling the alpha and numeric characters. The amendment also makes clear Customs policy that in cases of errors, in particular transpositions and duplications resulting from the commingling, the trade will be responsible for reconciling any such discrepancies between manifests and entries, except in a Customs post-audit process.

EFFECTIVE DATE: This amendment is effective March 31, 1989.

FOR FURTHER INFORMATION CONTACT: Eula Walden, Office of Automated Commercial Systems, (202) 566–6012.

SUPPLEMENTARY INFORMATION:

BACKGROUND

By a final rule published as T.D. 88–69 in the Federal Register on October 26, 1988 (53 FR 43197), section 4.7a, Customs Regulations (19 CFR 4.7a), was amended to require that each bill of lading accompanying a shipment of cargo carried by vessel be identified by a unique identifier containing not more than 16 characters. This identifier will serve to distinguish that particular bill of lading from other bills of lading issued by that carrier or issuer and from bills of lading issued by others.

The unique identifier is designed to enable the Customs Automated Commercial System (ACS) to more accurately track the progress of cargo from its arrival to its release. The identifier will, however, be required whether or not the carrier or other issuer of the bill is currently participating in ACS. This identifier must be used on any document which requires a bill of lading number.

As amended by T.D. 88–69, § 4.7a requires the use of the Standard Carrier Alpha Cose (SCAC) for the first four characters of the identifier. The remaining 12 characters of the identifier could be either alpha or numeric, with the alpha characters grouped either in the first or last positions. Commingling of the alpha and numeric characters was thus not permitted in the final rule published in T.D. 88–69.

It has, however, now been determined that is is not technically necessary to have this non-commingling requirement. By affording the option to commingle the alpha and numeric characters, if desired, carriers and other issuers may more easily employ their own numbering systems for purposes of complying with the unique bill of lading identifier requirement.

Accordingly, Customs processing of the unique bill of lading identifier will simply be limited to checking the validity of the SCAC code and ensuring that the bill of lading identifier has not been duplicated within the 3-year period. If these requirements are met, the identifier will be accepted into the manifest database. The trade will be responsible for correcting discrepancies, such as duplications and transpositions, which occur between manifests and entries. Customs will not perform any such reconciliation except as part of a post-audit review process. Consequently, in view of the above, § 4.7a(c)(2)(iii) is being amended to reflect these changes.

INAPPLICABILITY OF PUBLIC NOTICE PROVISION

As the amendment in effect provides an optional method for issuing unique bill of lading identifiers, and affords greater flexibility in their issuance which was desired by many commenters in the initial rulemaking, a notice of proposed rulemaking and delayed effective date is considered unnecessary under the Administrative Procedure Act, 5 U.S.C. 553.

EXECUTIVE ORDER 12291

The document does not meet the criteria for a "major rule" as specified by E.O. 12291. Accordingly, no regulatory impact analysis is required.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for this final rule the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), do not apply.

PAPERWORK REDUCTION ACT

The amendment is subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). The collection of information contained in this final regulation has already been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1515–0142. The estimated average burden associated with the collection of information in this final rule is 6 minutes. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to U.S. Customs Service, Paperwork Management Branch, Washington, D.C. 20229 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention Desk Officer for U.S. Customs Service.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Carriers, Manifests, Vessels, Bill of lading.

AMENDMENT

This document amends Part 4, Customs Regulations (19 CFR Part 4), as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general and specific authority citations for Part 4 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3.

* * * * * * *

§ 4.7a also issued under 19 U.S.C. 1431, 1439, 1465, 1498, 1584, 46 U.S.C. App. 674.

* * * * * * *

2. Section 4.7a(c)(2)(iii) is revised to read as follows:

§ 4.7a Inward manifest; information required; alternative forms.

* * * * * * *

(c) Cargo Declaration. * * *

(2) * * *

(iii) All bills of lading, whether issued by a carrier, freight forwarder, or other issuer, shall contain a unique identifier consisting of up to 16 characters in length. The unique bill of lading number will be composed of two elements. The first element will be the first four characters consisting of the carrier or issuer's four digit Standard Carrier Alpha Code (SCAC) assigned to the carrier in the National Motor Freight Traffic Association, Inc., Directory of Standard Multi-Modal Carrier and Tariff Agent Codes, applicable supplements thereto and reissues thereof. The second element may be up to 12 characters in length and may be either alpha and/or numeric. The unique identifier shall not be used by the carrier, freight forwarder or issuer for another bill of lading for a period of 3 years after issuance. Customs processing of the unique identifier will be limited to checking the validity of the Standard Carrier Alpha Codes (SCAC) and ensuring that the identifier has not been duplicated within a 3-year period. Carriers and broker/importers will be responsible for reconciliation of discrepancies between manifests and entries. Customs will not perform any reconciliation except in a post-audit process.

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 5, 1989.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 11, 1989 (54 FR 20380)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 2, 1989.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89–39)

Carriers: Fish processing supplies brought in a foreign-flag vessel to a U.S. port and transshipped to a U.S.-flag vessel which transports them to a U.S.-flag fish catching and processing vessel in the U.S. EEZ are imported when initially brought to the U.S. port but are not exported when brought to the U.S.-flag fish catching and processing vessel in the EEZ.

Date: December 2, 1988
File: VES–7–02 CO:R:P:C 109768/109572 PH
Category: Carriers

GREGORY K. MCCALL, ESQ.
PERKINS COIE
1201 Third Avenue
Fortieth Floor
Seattle, WA 98101–3099

Re: Customs treatment of goods, including fish nets, fish processing supplies, and food, brought from abroad to a United States port in a foreign-flag vessel and there transshipped to a United States-flag vessel which transports them to a United States-flag fish catching and processing vessel in the United States EEZ.

DEAR MR. MCCALL:

This is with reference to your letters of June 10 and September 16, 1988, on behalf of AKC Corporation with regard to the operation of the fish catching and processing vessel *Alaskan Hero* in the Unit-

ed States Exclusive Economic Zone (EEZ) in the Gulf of Alaska. Our letter of August 15, 1988 (File: 109572), also concerned this matter.

In addition to asking whether certain items may be entered as transit goods, you ask whether the items may be entered free of duty under some other procedure. As stated below, it is possible that the items could be entitled to drawback, under 19 U.S.C. 1313, or exempt from duties as supplies (not including equipment) of vessels of the United States employed in the fisheries, under 19 U.S.C. 1309. If you have any further questions about Customs treatment under these provisions, or about importation for immediate exportation, you may address those questions to the Entry Rulings Branch. The mailing address and telephone number of that branch are:

Mr. William Rosoff
Chief, Entry Rulings Branch
U.S. Customs Service
1301 Constitution Avenue NW.
Washington, D.C. 20229
(Telephone: 202–566–5856)

Facts:

You state that the *Alaskan Hero,* a United States-built vessel documented for the fisheries and registry trades but not the coastwise trade, operates as a fish catching and processing vessel in the United States EEZ in the Gulf of Alaska. You state that the owners of the *Alaskan Hero* are considering the following proposal for receipt and disposal by the vessel of certain items.

1. A Japanese-flag tramper will transport such items as Japanese-origin fish nets, cardboard boxes, food, and assorted miscellaneous supplies from Japan to Dutch Harbor, Alaska.
2. The Japanese tramper will offload the items to a United States-flag vessel in Dutch Harbor.
3. The United States-flag vessel will transport the items to the *Alaskan Hero* in the EEZ.
4. Crew members of the *Alaskan Hero* will consume the food. The boxes will be filled with fish caught and processed by the *Alaskan Hero.* These boxes will then be placed on a United States-flag vessel which will come into Dutch Harbor, obtain a Shippers Export Declaration (SED) for the fish and subsequently transport the boxes of fish to Japan. (Alternatively, the *Alaskan Hero* itself will return to Dutch Harbor, obtain the SED, and transport the boxes of fish to Japan.) The fish net, which is leased, will be used aboard the *Alaskan Hero.* At the end of the lease term, the fish net will be returned to Japan and will never be landed on United States territory.

You go on to state that since many of the crewmen of the *Alaskan Hero* are Japanese, food is sent from Japan for the vessel on a periodic basis. The boxes are loaned to the *Alaskan Hero* by the Japanese purchaser of the fish and are replenished on a periodic ba-

sis. The nets, which are leased for a 2-year period, have a useful life of approximately 3 years.

You ask that we rule on the issues set forth in the ISSUES portion of this ruling.

Issues:

1. Are foreign-origin goods which arrive at a United States port aboard a foreign-flag vessel and are there loaded onto a United States-flag vessel bound for a United States-flag fishing vessel on the high seas imported for duty purposes?

2. If such goods are not imported for duty purposes, may they be entered as transit goods for immediate export or pursuant to some other procedure?

Law and Analysis:

"Importation" is generally defined as "the bringing of goods within the jurisdictional limits of the United States with the intention to unlade them" (*Henry Hollander Co.* v. *United States,* 22 C.C.P.A. 645, 648 (1935); see also, *United States* v. *Field & Co.,* 14 Ct. Cust. App. 406 (1927), and 19 CFR 101.1(h)). "Exportation" is defined in 19 CFR 101.1(k) as "a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country * * *."

In this case, the items brought by the Japanese-flag tramper to Dutch Harbor would be considered to be imported because they are brought into the jurisdictional limits of the United States with the intention to unlade them; in fact, they actually are unladen. The items are not exported when they are transported by the United States-flag vessel to the *Alaskan Hero* in the EEZ and transferred to that vessel because they are neither severed from the mass of things belonging to this country (they are laden onto a United States-flag vessel) nor is there an intention to unite them with the mass of things belonging to some foreign country. Accordingly, the items under consideration would be considered imported, for duty purposes, when they are unladen in Dutch Harbor, and they may not be entered for immediate export, since they are not exported when they are taken to the *Alaskan Hero.*

With regard to your question of whether the items may be entered as transit goods pursuant to some procedure other than immediate exportation, it is possible that the goods could be entitled to drawback, under 19 U.S.C. 1313, or exempt from duties as supplies (not including equipment) of vessels of the United States employed in the fisheries, under 19 U.S.C. 1309. We note, however, that fish nets are considered vessel equipment and would not be exempt from duty under section 1309. If you have any further questions about Customs treatment under these provisions, or importation for immediate exportation, we suggest that you inquire of the Entry Rulings Branch (mailing address and telephone number given above).

We assume that you are aware of the possible applicability of the so-called Jones Act (46 U.S.C. App. 883), under which no merchandise may be transported between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in, owned by citizens of, and documented (for the coastwise trade) under the flag of, the United States. The items under consideration which are laden onto the United States-flag in Dutch Harbor would be prohibited from being transported in a non-coastwise-qualified vessel to another coastwise point and there being unladen, even if such unlading is only for transshipment and even if the non-coastwise-qualified vessel only performs part of the transportation. For example, food transported in a coastwise-qualified vessel from Dutch Harbor to the non-coastwise-qualified *Alaskan Hero* in the EEZ and in the *Alaskan Hero* to another coastwise point where it was transshipped to a third vessel would be transported in violation of section 883.

With regard to the applicability of section 883 to fish processing activities, your attention is directed to section 504 of the Act of December 29, 1982 (Public Law 97–389; 96 Stat. 1956), which added yet another proviso to section 883. Under this proviso, supplies aboard United States documented fish processing vessels, which are necessary and used for the processing or assembling of fishery products aboard such vessels, are considered ship's equipment and not merchandise.

We also assume that you are aware of the possible applicability of the so-called Nicholson Act (46 U.S.C. App. 251(a)) and the vessel documentation requirements in Chapter 121 of Title 46, United States Code, to the described operation. Under the Nicholson Act, very generally, a foreign-flag vessel may not land in the United States fish or fish products it has caught or received on the high seas (including the EEZ outside United States territorial waters). Under 46 U.S.C. 12108, subject to the laws regulating the fisheries, only a vessel for which a fishery license or an appropriately endorsed registry is issued may be employed in the fisheries. "Fisheries" is defined, in 46 U.S.C. 12101(a) (as recently amended by the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987; Public Law 100–239), to include the processing, storing, and transporting (except in foreign commerce) of fish and fish products in United States navigable waters and the EEZ in addition to the fish catching and related activities formerly included within the definition of "fisheries."

Holding:

1. Foreign-origin goods which arrive at a United States port aboard a foreign-flag vessel and are there loaded onto a United States-flag vessel bound for a United States-flag fishing vessel on the high seas are imported for duty purposes.

2. Such goods may not be entered for immediate export because they are not considered to be exported when they are taken to the United States-flag fishing vessel on the high seas.

(C.S.D. 89–40)

Vessels: The use of a vessel solely for cable laying does not violate the coastwise laws.

Date: December 2, 1988
File: VES–3–01 CO:R:P:C 109882 KMF

JOHN W. MCCONNELL, JR., ESQ.
HAIGHT, GARDNER, POOR & HAVENS
2828 Pennsylvania Avenue NW.
Washington, DC 20007

DEAR MR. MCCONNELL:

In your letter of November 18, 1988, you request a ruling on the application of 46 U.S.C. App. §§ 883, 292, and 289 to the proposed operation of a foreign cable-laying vessel in United States waters. You state that the vessel in question is a self-propelled cable-laying vessel, which is documented under the laws of Norway. The vessel was built foreign, is documented under foreign registry, and is owned by non-United States citizens. The vessel will load and transport approximately 3800 tons of cable. The cable will be loaded at a foreign port and transported in the vessel to United States territorial waters. Excess cable, up to a maximum length to be decided by the purchaser, will be included in the cable transported as spare cable. Unused cable, i.e., the cable in excess of that needed for the cable-laying operation, will be transported back and unloaded at the foreign port of origin.

You raise three questions, the first of which is:

Whether the cable-laying activities of the vessel within United States territorial waters, and the transportation of the cable in, and use of the cable by, the vessel in its cable-laying activities is subject to, or prohibited by, the provisions of section 27 of the Merchant Marine Act, 1920, as amended, 46 U.S.C. App. 883 or any other laws?

You state that the laying of the cable will start at a point ("Point A") offshore where the cable is to be connected to a terminal on land. From Point A, the portion of the cable to be connected to the terminal will be floated by a buoy to a point on the adjacent shore. It will be pulled to the terminal or point of connection at which that end of the cable will then be connected. The vessel will then propel itself while laying cable along the sound to the point at which the

cable laying will terminate ("Point B"). When the vessel arrives at Point B offshore, the terminal or place where the other end of the call will be connected with the land terminal will be floated by buoy to the shore. The cable will then be pulled to the terminal or point of connection on the land where that end of the cable will be connected.

Section 883, title 46, United States Code Appendix (46 U.S.C. App. 883), one of the "coastwise laws," prohibits the transportation of merchandise between ports or places in the United States on a foreign-built or foreign-owned vessel. The Customs Service has consistently held that the laying by a foreign vessel of underwater cable between two point embraced within the coastwise laws of the United States is not in violation of 46 U.S.C. App. 883. Customs has held that "the sole use of a vessel for the laying of cable is not coastwise trade subject to 46 U.S.C. 883." Customs Ruling Letter 109199, citing Customs Ruling Letters 105644 and 105648. See also C.S.D. 79–346. Such a vessel, however, could not be used to transport the cable between United States points. Id. It is the fact that the cable is not landed as cargo, but only paid out in the course of the laying operation, that makes the activity permissible. C.S.D. 79–346. See also Customs Ruling Letters 109690 and 109885.

The operation you describe is a cable-laying operation. The cable will not be landed as cargo, but will be paid out during the course of the operation. In light of the precedents discussed above, the operation you outline is not subject to, or prohibited by, 46 U.S.C. App. 883. We are unaware of any other laws that would prohibit this operation.

The second question you raise is as follows:

Whether the use of the equipment in the laying of the cable and in the making of the trench, in which the cable will be laid by the fluidizing and loosening of the seabed materials, is subject to, or prohibited by, the provisions of 46 U.S.C. App. 292 or any other laws?

You state that the cable will be laid by the "CAPJET" method. You describe the method as a non-mechanical trenching method that buries cable by jetting large quantities of water at low pressure, and combines an effect of fluidizing the seabed and the hydrodynamic transport of the fluidized material. The device buries the cable by the use of water-jetting nozzles that loosen the seabed materials under and around the cable. As the jetting equipment moves forward, the fluidized loosened material moves slightly backward and then sinks down on the embedded cable, thereby filling the trench around the cable. You state that the trench is only marginally larger than the cable itself and that the surrounding seabed is left undisturbed, eliminating scouring under the cable.

Section 1 of the Act of May 28, 1906 (34 Stat. 204; 46 U.S.C. App. 292), provides that "a foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States." In our interpretation of this statute, we have ruled that dredging in the United States is prohibited to any foreign-built dredging vessel except one of those named in section 2 of the 1906 Act (see Customs Service Decision (C.S.D.) 85–11).

For purposes of 46 U.S.C. App. 292, "dredging in the United States" includes dredging in United States territorial water, generally defined as the belt, 3 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea base line, and certain dredging on the United States outer continental shelf (OCS) outside territorial waters (see C.S.D. 85–11). We have held that section 292 applies to dredging on the OCS only for the purposes described in section 4 (a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)), and not to dredging done to prepare the seabed of the OCS for the laying of a transoceanic cable (see Customs Ruling Letter 109016).

Customs has held that "dredging," for purposes of 46 U.S.C. App. 292, is the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material. Using this definition of dredging, we have ruled that the use of a foreign-built vessel to tow an underwater sea plow to create a furrow or a trench into which a cable is to be laid during the course of cable-laying operations is prohibited by section 292, because the vessel is considered to be engaged in dredging. See, e.g., C.S.D. 79–331.

Nevertheless, we have recently held that a cable-laying vessel is not engaged in dredging as that term has been interpreted for purposes of 46 U.S.C. 292, if the vessel uses a cable-laying device that emulsifies the seabed by a jetting action. C.S.D. 88–7. We reasoned that, during this process, a very narrow slice of the seabed is temporarily lifted so that the cable might be buried beneath it. We found that though the process does not actually cut a slice of the seabed, the jetting action and the resulting emulsification process create a similar effect. Id.

We found that after the cable is buried, the soil of the seabed, whether sliced out or emulsified, returns to the seabed so as to leave it virtually undisturbed. Id. We held that in view of the limited and temporary manipulation of the seabed effected by such cable burial devices and in view of the treatment of cable-laying vessels under the coastwise laws, the use in United States territorial waters of such cable burial devices from cable-laying vessels is not an engagement in "dredging" as that term has been interpreted for purposes of 46 U.S.C. App. 292.

The cable-laying device you propose to use, "the CAPJET method," is one that emulsifies the seabed surrounding the cable. The seabed returns to its normal state shortly after the cable is

laid. The device is essentially the same device as the one discussed in C.S.D. 88–7. Since we found the use of that device not to constitute dredging for purposes of 46 U.S.C. App. 292, the use of the CAPJET method for laying cable does not constitute dredging as that term has been defined under 46 U.S.C. App. 292. The use of the CAPJET method is not subject to, or prohibited by, 46 U.S.C. App. 292. We know of no other laws that would prohibit the use of the CAPJET method.

The third question you raise is as follows:

Whether the transportation of the persons aboard the vessel engaged in the cable-laying activities is subject to, or prohibited by, 46 U.S.C. App. 289 or any other laws?

You state that in addition to the personnel required for the navigation of the vessel, there will be personnel aboard to carry out the cable-laying activities. It is our understanding that no other people will be on board the vessel.

Section 289 of Title 46, United States Code Appendix, states that "[n]o foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of $200 for each passenger so transported and landed." Pursuant to 19 C.F.R. 4.80a and 4.50, the term "passenger," for purposes of § 289, is defined as "any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business."

As you describe them, the individuals who will be on board the cable-laying vessel are connected either with the navigation or with the business of the vessel. Therefore, they are not passengers as that term has been defined under 46 U.S.C. App. 289. Their transportation is not subject to, or prohibited by, 46 U.S.C. App. 289. We know of no other laws that would prohibit their transportation.

We conclude that the cable-laying activities are not prohibited by the provisions of 46 U.S.C. App. 883, that the use of the CAPJET system in the laying of the cable is not prohibited by the provisions of 46 U.S.C. App. 292, and that the transportation of the individuals involved in the navigation of the vessel and in the cable-laying operations is not prohibited by the provisions of 46 U.S.C. App. 289.

(C.S.D. 89–41)

Foreign Trade Zone: Entry of merchandise transferred from a foreign trade zone (FTZ) to Customs territory with subsequent readmission to the FTZ in domestic status where there is an intent to circumvent the tariff laws will be rejected and the merchandise restored to its last FTZ status.

Date: December 14, 1988
File: FOR–2–04–CO:R:C:E 218898L 219003
Category: Other

LAWRENCE D. BLUME, ESQ.
MILLER & BLUME
2320 Commerce Tower
911 Main Street
Kansas City, MO 64105

DEAR MR. BLUME:

This is in response to your communication of June 12, 1986, concerning certain steel stamping operations in a foreign trade subzone.

Facts:

Nonprivileged foreign and domestic sourced steel coil is admitted into a FTZ and manufactured into stampings. All foreign sourced steel is subject to the Voluntary Restraint Agreement. The stampings produced from foreign steel coil are entered for consumption and are said to be physically removed from the FTZ into Customs territory; we are advised, however, that the stampings are actually removed from "activated" zone space to "deactivated" zone space. The stampings are thereafter readmitted to the zone in domestic status and used (along with the stampings produced from domestic steel coil) in the manufacture of different articles, which are transferred from the zone for consumption or exportation.

With the adoption of new Customs Regulations applicable to FTZs (see T.D. 86–16, effective May 12, 1986) certain operations involving transfer of merchandise from a zone and its subsequent readmission to the zone in a different zone status are precluded by section 146.71(d)(1), Customs Regulations (19 CFR 146.71(d)(1)).

A question has been raised whether the procedure described above is in conformity with the revised Customs foreign trade zone regulations.

Issue:

May an article manufactured in a foreign trade zone (FTZ) and subsequently transferred from the zone and entered for consumption be returned to the FTZ in domestic status for further manufacture?

Law and Analysis:

The regulation in issue, section 146.71(d)(1), provides as follows:

(d) *Retention or return of merchandise to zone for consumption.*

(1) The district director shall cancel any entry for consumption where: (i) The merchandise is not removed from the zone within the period specified in paragraph (c) of this section, or (ii) the merchandise was removed from the zone but did not enter the commerce of the U.S. in Customs territory and was subsequently readmitted to a zone in domestic status. If the district director has reason to believe

any new entry would be cancelled under the provisions of this subparagraph, he may reject the entry or demand a written stipulation, as a condition of entry acceptance, that the merchandise will not be returned to a zone in domestic status. Merchandise covered by an entry which has been cancelled under this subparagraph shall be restored to its last foreign status.

The statutory basis of this regulation is the second proviso of section 3 of the Foreign Trade Zones Act (19 U.S.C. 81c). It provides:

That subject to such regulations respecting identity and the safeguarding of the revenue as the Secretary of the Treasury may deem necessary, articles the growth, product, or manufacture of the United States, on which all internal-revenue taxes have been paid, if subject thereto, and articles previously imported on which duty and/or tax has been paid, or which have been admitted free of duty and tax, may be taken into a zone from the Customs territory of the United States, placed under the supervision of the appropriate Customs officer, and whether or not they have been combined with or made part, while in such zone, of other articles, may be brought back thereto free of quotas, duty, or tax.

The Foreign Trade Zones Board, in 19 U.S.C. 81b(a), is authorized to grant the privilege of establishing, operating, and maintaining foreign trade zones. The location and land area of a zone are stated in the application for establishment of a zone (19 U.S.C. 81f(a)(1)), and, if suitable, comprise the zone as granted (19 U.S.C. 81g). A foreign trade zone is not in the Customs territory of the United States.

"Activation", "deactivation," and "alteration" are currently defined in 19 CFR 146.1(b). The concepts of activation and deactivation do not remove or add a tract of land from or to the Customs territory of the United States; they grant authority to commence or discontinue operations in a zone or subzone. Alteration, depending upon the circumstances, may change the physical boundaries of a zone thus adding or removing land from the Customs territory; however, this implies a change in the foreign trade zone grant.

On the facts presented, and under definitions in effect as of May 12, 1986, there was neither deactivation of the subzone nor an alteration in the zone grant that resulted in the physical removal of the nonprivileged foreign body stampings from the zone to Customs territory with subsequent readmission to the zone. The stampings never physically left the zone and therefore never changed their status from nonprivileged foreign to duty-paid domestic. C.S.D. 83–96, holding that the status of foreign merchandise may be changed to that of domestic merchandise by making entry and paying duty without actual removal from the zone, is not applicable as it relates to situations involving errors in inventory records when there is no interference with the protection of the revenue.

The above notwithstanding, the essential issue raised is whether the operation described is a "sham" transaction or one permitted by the second proviso to 19 U.S.C. 81c.

The second proviso, quoted in full above, but as pertinent here, provides that "subject to such regulations respecting * * * safeguarding of the revenue as the Secretary of the Treasury may deem necessary, articles * * * previously imported on which duty and/or tax has been paid * * * may be taken into a zone from the Customs territory * * * and whether or not * * * made part * * * of other articles, may be brought back thereto free of * * * duty."

Prior to promulgation of the revised FTZ regulations, T.D. 86–16, effective May 12, 1986, it was our opinion that the operation as described was in literal compliance with the Foreign Trade Zones Act, as stated in memorandum 216593 of January 25, 1984, cited by the inquirer, if the articles were taken from the FTZ into Customs territory, entered with payment of duty, and subsequently readmitted to the FTZ in domestic status.

Memorandum 216593 states that "deactivated zone space" is Customs territory. While "deactivation" was not defined by law or regulation at that time, and while "deactivation" as now defined means voluntary discontinuation of the activation of an entire zone or subzone, upon reconsideration that statement was incorrect. Only the Foreign Trade Zones Board can grant or change the boundaries of the FTZ. "Activation" and "deactivation" are administrative procedures relating to the operation of a zone and the admission and handling of merchandise in a zone; neither changes the status of a zone from or to Customs territory.

However, with the promulgation of section 146.71(d)(1), even if the boundaries of the zone were altered by the Foreign Trade Zones Board in such a manner as to permit the stampings to momentarily come into Customs territory for entry and payment of duty before being readmitted to the zone; or even if the stampings were removed a substantial distance from the zone for a substantial period before readmission to the zone, the issue becomes the intent of the removal and subsequent readmission.

As discussed in the comments section of the final rule revising the foreign trade zones regulations (51 FR 5040 at 5045), the purpose of the prohibition against further manufacture in section 146.71(d)(1) was to avoid abuse of the second proviso of 19 U.S.C. 81c by an assortment of schemes designed to circumvent high duty rates.

The statutory basis for section 146.71(d)(1), as previously noted, is the second proviso of 19 U.S.C. 81c which specifically authorizes the Secretary of the Treasury to make regulations respecting the safeguarding of the revenue as may be deemed necessary.

Since there may be many situations in which there is a bona fide entry for consumption from a zone followed by readmission of the duty-paid article to the same or another zone in domestic status, an effort was made to draft the regulation in such a manner as to minimize those transfers to Customs territory that were made only so that the articles could be entered and readmitted to the zone with a

design to circumvent provisions of restriction or limitation in the tariff laws or to secure a benefit that would otherwise not be available.

It was recognized that a judgment would have to be made in each case as to the purpose of the transaction. In the comments section of the final revision of the foreign trade zones regulations (51 FR 5046) a number of factors to be considered in making that judgment were noted. They were:

1. Length of time the merchandise was outside the zone before readmission.
2. Whether readmission was requested by the importer of record or his agent or a person acting in collusion with the importer of record.
3. Credible evidence that there was an intent by the importer or others, at the time of entry, to seek readmission to the zone.
4. Whether the merchandise evades a higher rate of duty or an import restriction because of its having been admitted in domestic status.
5. The merchandise was not used or was not the subject of a bona fide sale by the importer after entry.
6. The merchandise was not further processed or manufactured outside the zone, or such processing or manufacture was minimal or cosmetic in nature.

While the six factors listed are not all-inclusive, when applied to the operation in issue, the operation fails on all six. First, as we understand the operation, the stampings are alleged to be outside of the zone for a matter of minutes at best before readmission to the zone. Readmission is requested by the importer or his agent. It is unquestioned that the importer's intent at the time of entry is to seek readmission to the zone. The merchandise in this case, by being subjected to the described transfer to Customs territory, entry, and readmission to the zone in domestic status, is subject to a rate of duty of 3 percent ad valorem rather than 25 percent ad valorem, the rate of duty on the finished product the merchandise is incorporated into. The merchandise is not used or sold after entry and there is no intention to use or sell it after entry. There is no further manufacture or processing of the merchandise outside of the zone after entry.

We conclude that the intent of the operation described is to circumvent a high rate of duty on the finished product manufactured in the zone and that there is no intention that the merchandise enter the commerce of the United States prior to its readmission to the zone. Accordingly, entries covering merchandise the subject of this ruling should be rejected or cancelled, and such merchandise should be restored to its last foreign status.

Inasmuch as it was our view before reconsideration that the described operation was in literal compliance with the law and regulations prior to May 12, 1986, the effective date of the revised regula-

tions, and inasmuch as no determination as to whether the merchandise was intended to enter the commerce of the United States has been made until now, all entries covering merchandise the subject of this ruling up to and including the date of this ruling may stand or be liquidated as entered. Entries for the subject merchandise submitted after the date of this ruling shall be rejected or cancelled, as appropriate, and the merchandise restored to its last foreign status.

Holding:

Pursuant to section 146.71(d)(1), Customs Regulations, any merchandise transferred from a zone to Customs territory and entered for consumption where the intent is to circumvent provisions of restrictions or limitation in the tariff laws or to secure a benefit that would otherwise not be available, and where there is not an intent that the merchandise enter the commerce of the United States in Customs territory, will be restored to its last foreign zone status and the entry rejected or cancelled.

Determinations as to the intent of the entry will be made on a case by case basis with due consideration of all relevant circumstances.

(C.S.D. 89–42)

Liquidation/Reliquidation: A request for reliquidation under 19 U.S.C. 1520(c)(1) on the basis of a misclassification and misdescription on the entry is correctable only under 19 U.S.C. 1514, absent evidence that the error was due to a mistake of fact.

Date. December 12, 1988
File: LIQ–9–01–CO:R:C:E 221005 GG
Category: Liquidation/reliquidation

DISTRICT DIRECTOR OF CUSTOMS
610 South Canal Street
Chicago, IL 60607

Re: Request for Further Review of Protest No. 3901–7–000085, dated January 27, 1987.

DEAR SIR:

The following is in reply to your request on March 16, 1987, for further review of the above-referenced protest.

Facts:

Protester imported a West German rebar bending machine. The merchandise was entered on May 7, 1986 and the entry was liquidated on June 13, 1986. The rebar machine was entered and liqui-

dated under item 649.43 of the Tariff Schedules of the United States (TSUS), and a duty of 8.2% was assessed.

The protester's broker filed a 19 U.S.C. 1502(c)(1) request for reliquidation and refund of duty with the U.S. Customs Service (Customs) on November 25, 1986. The request for relief under this provision was based on an alleged error in the original classification of the rebar bending machine. No clerical error or mistake of fact issue was raised. The protester claimed that the goods should have been entered under item 674.35, TSUS which has a lower duty rate of 4.8%. The requested refund was approximately $375. Enclosed with the 19 U.S.C. 1502(c)(1) petition was a corrected entry summary which listed the new TSUS item number.

The claim was denied on January 7, 1987 by the U.S. Customs Service, which stated that the protester had failed to supply evidence to support the request for reliquidation and refund. The importer then protested this adverse decision by filing a protest under section 514(a)(7) of the Tariff Act of 1930, as amended, challenging Customs' refusal to grant relief under 19 U.S.C. 1502(c)(1). In addition to reiterating that the original classification of the bending machine was incorrect, the protester in this protest brought up the new issue that a 3% cash discount had been omitted and not deducted from the entered value of the merchandise.

Issues:

1. Whether the protest in question was timely filed;
2. Whether protester's 19 U.S.C. 1520(c)(1) request for reliquidation and refund of duties was properly denied by Customs;
3. Whether a new issue which was not included to support objections raised by a valid protest may be brought up in a 19 U.S.C. 1514 protest against a decision by Customs refusing to reliquidate an entry under 19 U.S.C. 1520(c)(1).

Law and Analysis:

As a preliminary matter, both the 19 U.S.C. 1520(C)(1) petition and the subsequent section 514 protest were timely filed. The petition was submitted within a year of the date of liquidation, and the protest was received by Customs before the 90-day time limit had expired. A denial of the claims thus cannot be predicated on the basis that the importer did not comply with filing requirements.

19 U.S.C. 1520(c)(1) allows reliquidation of an entry to correct a clerical error, mistake of fact, or inadvertance not amounting to an error in the construction of a law. Relief is not available under this provision where, as here, the error asserted is one of the classification of merchandise, and no other grounds which would permit reliquidation have been set forth. Numerous cases have held that a determination as to the classification of merchandise is a conclusion of law, and an error in this area ordinarily cannot be remedied under 19 U.S.C. 1520(c)(1). *See,* e.g., *Mattel Inc.* v. *United States,* 377 F. Supp. 955, 72 Cust. Ct. 257, C.D. 4547 (1974), *C.J. Tower & Sons of*

Buffalo Inc. v. *United States,* 336 F. Supp. 1395, 68 Cust. Ct. 17, C.D. 4327 (1972), and *Gerry Schmidt & Co.* v. *United States,* 371 F. Supp. 1079, 71 Cust. Ct. 194 (1973).

An error in classification, as noted above, is a mistake in the applicable law which can only be corrected by filing a 19 U.S.C. 1514 protest within 90 days after liquidation. *Ibid.* While courts have allowed conversion of 19 U.S.C. 1520(c) claims into section 514 protests when all 514 requirements have been met, in this case the protester's letter was filed outside the 90 day time limit, therefore cannot be treated as a section 514 protest. *See A. Giurlani & Bros., Inc.* v. *United States,* 9 CIT 60 (1985). For these reasons, even if the original classification was wrong, Customs has no authority to reliquidate the entry.

In addition to there being no evidence to substantiate that a 3% discount had been taken advantage of by the importer, the valuation claim must be denied because it was untimely filed. This issue should have been protested within 90 days after liquidation of the merchandise. 19 U.S.C. 1514(c)(2)(A). A protest of a decision refusing to reliquidate an entry under 19 U.S.C. 1520(c)(1) cannot be expanded to serve as a means to extend the time period within which new and unconnected issues not previously protested may be raised. To allow this claim now would serve to nullify the statute of limitations specified within section 514. *See Phillips Petroleum Company* v. *United States,* 54 CCPA 7 (1966).

Holding:

In view of the foregoing, you are directed to deny the protest in full.

(C.S.D. 89–43)

Valuation: The dutiability of payments made by the buyer to the manufacturer.

Date: December 12, 1988
File: CLA–2 CO:R:CV:V 544205 VLB
Category: Valuation

WILLIAM L. MORANDINI
DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
477 Michigan Avenue
Detroit, MI 48226–2568

Re: Request for Internal Advice on Cancellation Payments Made by Ford Motor Company; IA 33/88.

DEAR MR. MORANDINI:

This is in response to your memorandum requesting internal advise on the dutiability of payments made by Ford Motor Company (hereinafter referred to as the "buyer") to BMW-Steyr (hereinafter referred to as the "manufacturer").

Facts:

The buyer and the manufacturer on May 21, 1981, entered into an agreement to purchase 2.4 liter diesel engines for the subsequent model years. Under the purchase agreement, the buyer is to purchase a minimum number (25,000) of engines in each model year. If the buyer fails to purchase the minimum number of engines, the agreement provides that the buyer shall compensate the seller either by a "purchase price adjustment or in some other form". The contract contains a unit price list ranging from 34,240 Austrian Schillings (AS) per engine if 50,000 to 90,000 engines are ordered per year to AS 188,651,040 if one engine is purchased.

In the 1985 model year, the manufacturer produced 299 engines for the buyer and shipped them to a Foreign Trade Sub-Zone in a nonprivileged foreign status. Of the 299 engines, 294 were returned to the manufacturer and 5 were entered into the United States and installed into vehicles. At least 4 of the engines have been scrapped or are awaiting scrapping.

Ford received a credit for the returned engines and paid the manufacturer AS 190,894,657 for failure to purchase the agreed upon quantity for the 1985 model year. You contend that the payment is dutiable under transaction value and should be apportioned to the five engines that were entered for consumption in the United States. The importer on the other hand argues that the payment was not part of the price actually paid or payable for the engines, but rather is in the nature of liquidated damages.

With respect to the 1986 model year, the manufacturer did not produce any engines for the buyer and the buyer wanted to terminate the contract. Therefore, the parties negotiated a settlement of AS 172,500,000 representing the buyer's contingent liability for the 1986 model year. The importer contends and you agree, that the lump sum payment for 1986 is not dutiable because the buyer did not purchase any merchandise.

Issues:

(1) Whether the buyer's payment to the seller for failure to purchase the minimum quantity of engines for the 1985 model year is dutiable.

(2) Whether the buyer's payment to the seller for the cancellation of the agreement for the 1986 model year is dutiable.

Law and Analysis:

The dutiable value of merchandise transferred from a foreign trade zone is defined under 19 CFR 146.65 as the "price actually paid or payable for merchandise in the transaction that caused the merchandise to be admitted into the zone."

The term "price actually paid or payable" is defined in section 402(b)(4)(A) of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979 (19 U.S.C. section 1401a(b)(1); TAA):

> * * * the total payment (whether direct or indirect * * *) made, or to be made for imported merchandise by the buyer to, or for the benefit of, the seller.

In this case, the buyer alleges that the 1985 lump sum payment is not part of the price actually paid or payable for the imported engines, but rather is in the nature of liquidated damages. The importer cites Headquarters Rulings 543445 and 543456, dated October 23, 1985, and November 6, 1985, respectively, in support of its position. In those rulings, the parties agreed to a "base selling price" plus additional compensation in the event that a minimum number of gasoline engines was not purchased.

We held that the agreement essentially provided that the final unit price for the engines purchased during a model year would not be known until the number of engines actually purchased during the year was known. Therefore, we concluded that there was a direct relationship between the additional compensation and the engines that were purchased and imported, and were part of the price actually paid or payable for the engines. The amount paid was to be apportioned over the number of engines actually imported in the relevant model year.

The present case presents a similar scenario. In the agreement at issue, the unit purchase price is determined by straight line interpolation between prices set forth in a price schedule. The payment at issue for the 1985 model year has been reduced by several million Austrian Schillings for the 294 returned engines. As a result, the only issue remaining is whether the amount paid for the 1985 model year is the price actually paid or payable for the five engines that were imported into the United States. We conclude that the entire payment was the price actually paid for the five engines purchased for the 1985 model year.

This conclusion is consistent with the price schedule in the contract which clearly provides for a price reduction as the quantity purchased increases. Moreover, the contract language specifically provides for a purchase price adjustment if the minimum number of engines is not purchased. The contract language and the circumstances presented do not support the importer's contention that the 1985 payment was liquidated damages rather than the price actually paid for the five engines. Finally, in this case there is no method

to determine what portion of the payment, if any, was a penalty for failure to purchase the minimum number of engines.

The lump sum payment for the 1986 model year presents a different situation. In 1986, the importer purchased no engines. Both you and the buyer agree that the 1986 payment is not dutiable because the buyer did not purchase any merchandise. This issue also was addressed in Headquarters ruling 543445 regarding a contract for the purchase of diesel engines. In that case we held that the amounts paid by the importer to the manufacturer for failure to purchase any diesel engines during a model year were not dutiable. Based on our prior ruling, we agree that the lump sum payment for the 1986 model year is not dutiable.

Holding:

(1) The buyer's payment to the seller for the 1985 model year represents the price actually paid for the five engines imported into the United States and therefore is dutiable.

(2) The buyer did not purchase any merchandise for the 1986 model year, therefore, the 1986 payment is not dutiable.

(C.S.D. 89–44)

Marking: Country of origin marking of a printed paperboard wall planner.

Date: December 8, 1988
File: MAR 2-05 CO:R:C:V 731394 LR
Category: Marking

K. CHAPMAN
KEENERCAL INC.
152 Howland Avenue
Toronto, Ontario M5R 3B5

Re: Country of Origin Marking Requirements Applicable to a Printed Paperboard Wall Planner.

DEAR MS. CHAPMAN:

This is in response to your letter dated March 25, 1988, addressed to the Regional Commissioner of Customs, New York, requesting a decision concerning whether your proposed method of marking the country of origin on a wall planner made in Canada is acceptable. Your letter, along with the submitted sample, was forwarded to our office for reply.

Facts:

The submitted sample is a printed paperboard wall planner which measures approximately 2' × 3', with the words "University of Vermont" appearing in large print across the top. The word "Vermont" appears in small print on the top right of the planner across the shirt of "Charlie Catamount", the University of Vermont mascot. The phrases, "Lithographed in Canada" and "Product of North America", are to appear at the bottom of the wall planner (the former on the bottom right; the latter on the bottom center). We assume that the wall planner is made entirely in Canada since the letter does not indicate otherwise.

Issues:

1. Do the two references to "Vermont" trigger the requirements of section 134.46, Customs Regulations?

2. Do the two phrases "Lithographed in Canada" and "Product of North America" adequately "indicate" the country of origin?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires, subject to certain specified exceptions not applicable here, that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to *indicate* to an ultimate purchaser in the U.S. the English name of the country of origin (emphasis added).

Section 134.46, Customs Regulations (19 CFR 134.46), sets forth special requirements that are applicable when the name of a country or locality other than the country of origin appears on the imported article. Specifically, 19 CFR 134.46 requires that the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning shall appear, legibly and permanently, and in close proximity to such words and in at least a comparable size.

Issue No. 1

Although the requirements of 19 CFR 134.46 would generally apply whenever the word "Vermont" (or the name of some other place other than the country of origin) appeared on a Canadian-made article, Customs has ruled that these requirements do not apply when the place name appears in the text or content of printed material. Customs is of the opinion that in these circumstances, a reference to a place other than the country of origin would not confuse the ultimate purchaser as to the true country of origin. (*See* HQ 729817, dated November 13, 1986).

In this case, the article in question is a wall planner that is designed to be used by individuals who either attend, or would like a souvenir of the University of Vermont. The two references to "Ver-

mont" are an integral part of the printed wall planner, appearing in the context of the printed material itself and are not an indication of origin. Accordingly, the requirements of 19 CFR 134.46 are not applicable.

Issue No. 2

As indicated above, every article of foreign origin that is subject to the requirements of 19 U.S.C. 1304 must be marked in a manner as to *indicate* to an ultimate purchaser in the U.S. the English name of the country of origin. In *American Burtonizing Co.* v. *United States*, 13 CCA 652, T.D. 41489 (1926), the U.S. Court of Customs Appeals interpreted the word "indicate" in the context of section 304(a) of the Tariff Act of 1922, the predecessor of section 19 U.S.C. 1304. The court stated that:

> It is not reasonable to suppose that Congress, by the use of the word "indicate," meant only that the words used should *hint* at the country of origin. The object sought to be obtained by the legislature could best be obtained by an indication which was clear, plain, and unambiguous and which did more than merely *hint* at the country of origin. We do not think that Congress intended that American purchasers, consumers, or users of foreign-made goods should be required to speculate, investigate, or interpret in order that they might ascertain the country of origin.

In HQ 730647, dated August 21, 1987, affirmed in HQ 730695, dated September 16, 1987, the phrase, "MADE IN TAIWAN NATIONAL HEADQUARTERS IN U.S.A.", was found to be unacceptable marking because it is subject to various interpretations, including one that implies that the goods were made in the U.S.

While Customs has, for purposes of 19 U.S.C. 1304, allowed the phrase "Lithographed in (country of origin)" on certain printed material (HQ 730659, dated August 26, 1987), the phrase would be unacceptable if it is accompanied by some other origin indicator which may be confusing to the ultimate purchaser. In this case, we are of the opinion that the phrase "Product of North America" may confuse the ultimate purchaser as to the origin of the printed material. North America includes, *inter alia,* the United States, and this fact may lead an ultimate purchaser to conclude that, while the planner is lithographed in Canada, it is, by virtue of some other manufacturing processes, a product of the U.S. As such, we find that the proposed marking is not clear, plain and unambiguous and that it does not properly "indicate" the country of origin as required by 19 U.S.C. 1304.

Any of the following markings would properly indicate the country of origin: "Lithographed in Canada" (provided the language "Product of North America" is omitted); "Product of Canada" or "Product of North America (Canada)."

Holding:

The proposed marking "Lithographed in Canada" on a printed paperboard wall planner of Canadian origin is unacceptable country of origin marking when the phrase "Product of North America" also appears on the product.

(C.S.D. 89–45)

Marking: Country of origin marking of rack and pinion steering assemblies, reassembled in Mexico from U.S. parts.

Date: December 9, 1988
File: MAR–2–03–CO:R:C:V 731482 SO
Category: Marking

CAROLINE BALDWIN KAHL, ESQ.
BRYAN, CAVE, MCPHEETERS & MCROBERTS
1015 15th Street NW.
Washington, DC 20005–2689

Re: Marking of rack and pinion steering assemblies, reassembled in Mexico from U.S. origin parts.

DEAR MS. KAHL:

In your letter of June 3, 1988, you requested a binding ruling on whether the foreign processing of the U.S. rack and pinion steering assembly units (the units) in Mexico results in a substantial transformation which would require the units to be marked as products of Mexico.

Facts:

Your client proposes to export the units along with a limited quantity of other U.S. parts. The units will be completely disassembled in Mexico, after which cleaning and minor machining will be performed. The units will be reassembled as follows. The control valve will be reinstalled with new U.S. origin seals, and the adapters attached to the housing holes. A U.S. origin steel sleeve liner will be installed to eliminate the wear found in the original part, and a series of tests performed which simulate normal driving conditions. A check for leakage will be performed and paint will be applied electrostatically. Finally, inner tie rods, dampers, new bellow boots and other components will be installed.

The time to process a unit is estimated at one hour. No skilled labor is required to perform the processing in Mexico. The unit will retain approximately 80 percent of the value of the article originally exported. You submitted detailed mechanical drawings of the units and color photographs taken both before and after the foreign processing along with legal arguments that no substantial transfor-

mation occurs. We understand that the returned articles will not be entered under item 807.00, Tariff Schedules of the United States (TSUS).

Issue:

What marking, if any, would be required for rack and pinion steering assembly units which are reassembled in Mexico from U.S. parts, pursuant to the country of origin marking requirements of the law and regulations?

Law and Analysis:

Section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304) generally requires that every article of foreign origin or its container imported into the U.S. must be legibly, permanently and conspicuously marked to indicate the English name of the country of origin to a ultimate purchaser in the U.S. The country of origin marking requirements are set forth in Part 134, Customs Regulations (19 CFR Part 134). The term "country of origin" is defined in 19 CFR 134.1(b) as the "country of manufacture, production, or growth of any article of foreign origin entering the U.S." Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

By definition, only merchandise which is "of foreign origin," that is of a country of origin other that the U.S., is subject to the requirements of 19 U.S.C. 1304. Stated differently, products of the U.S. are not subject to these requirements. Since further work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin, if a U.S. product is sent abroad for processing, it remains a product of the U.S. (and not subject to the requirements of 19 U.S.C. 1304 upon its reimportation) unless prior to its importation, the U.S. article is substantially transformed into an article of foreign origin. However, pursuant to Section 10.22, Customs Regulations (19 CFR 10.22), articles assembled abroad in whole or in part from U.S. components and entered under item 807.00, TSUS, are considered products of the country of assembly for purposes of 19 U.S.C. 1304, whether or not the assembly constitutes a substantial transformation. This regulation further states that if an imported assembled article is made entirely of American-made materials, the U.S. origin of the material may be disclosed by using a legend such as "Assembled in _____ from material of U.S. origin," or a similar phrase.

Section 134.32(m), Customs Regulations (19 CFR 134.32(m)), specifically excepts from country of origin marking requirements U.S. products exported and returned. In applying this section, Customs has ruled that U.S. products which are sent abroad for further processing are not subject to country of origin marking upon reimportation of the article into the U.S., provided the further

processing in the foreign country does not constitute a substantial transformation.

In order for a substantial transformation to be found, an article having a new name, character, and use must emerge from the processing. See *U.S.* v. *Gibson Thomsen Co., Inc.* 27 C.C.P.A. 267, C.A.D. 98 (1940). In a more recent country of origin marking case involving the issue of substantial transformation, *National Juice Products Association* v. *U.S.*, Slip Op. 86–13 (January 30, 1986) the Court of International Trade upheld Customs determination that imported orange juice concentrate is not substantially transformed when it is processed into retail orange juice products. In that case the orange concentrate was mixed with purified and dechlorinated water, orange essences, orange oil and in some cases, fresh juice, quality tested and either packed in cans and frozen or pasteurized, retested, chilled, and packed in liquid form. Customs found, and the court agreed, that the domestic processing did not produce an article with a new name, character, and use because the essential character of the final product was imparted by the imported concentrate and not the domestic processing. The court also noted that the manufactured concentrate constituted the majority of the value of the end product and imparted the essential character so as to be the very essence of the final product.

In Headquarters Ruling 728269 of July 20, 1985, certain three dimensional greeting cards called "Pop Shots" were printed, folded, scored for further folding, die-cut and perforated in the U.S. The cards were then sent to Mexico where the die-cut portions were pressed out, folded and glued. We held that for purposes of marking, the imported product was a product of the U.S., and no country of origin marking was required. The major manufacturing operations were performed in the U.S. In contrast, the operations performed in Mexico were minor (pressing out, folding and glueing) and did not substantially transform the card into a product of Mexico. See also Headquarters Ruling 729516 of May 12, 1986 (impact drivers and partially finished screw extractor bodies and ball-joint or tie rod separator forgings, imported from Japan and further processed in the U.S., were not substantially transformed by the further processing).

Holding:

Based on the above considerations, we find that the processing performed in Mexico does not substantially transform the U.S. rack and pinion steering assembly units into a new and different article of commerce with a different name, character and use. Accordingly, for purposes of 19 U.S.C. 1304, the imported units are treated as U.S. products exported and returned and are exempt from marking pursuant to 19 CFR 134.32(m).

(C.S.D. 89–46)

Marking: Country of origin marking of a nylon sports bag by the use of a fabric label.

Date: December 2, 1988
File: MAR–2–03 CO:R:C:V 731534 SO
Category: Marking

MR. CLAUDE A. BROSSEAU
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 12919–9703

Re: Marking of nylon sports bag by use of fabric label.

DEAR MR. BROSSEAU:

In your letters of June 20, and October 28, 1988, on behalf of Travelway Luggage Ltd. of St. Laurent, PQ, Canada, you requested a firm ruling on whether the use of a fabric label which reads "MADE IN KOREA" above "FABRIQUE EN COREE" would comply with the country of origin marking requirements of the law and regulations for marking of a nylon sports bag.

Facts:

You submitted a sample of a nylon sports bag which your client intends to import from Korea. The trademark "The Body Shop by VENTURE" with the design of an exercising figure appears on both ends of the bag. Upon careful examination of the inside of the bag, we noted a small white fabric label (1½" by ⅝") sewn on the seam approximately 3½ inches below the zipper. The words on the label were not visible because the printed side was facing the side of the bag. Since the side of the bag is also white, the label is easily missed. A potential customer (assuming he/she notices the label at all) would have to purposefully flip it over to read it.

Issue:

Would the use of a label which states "MADE IN KOREA" above the words "FABRIQUE EN COREE," sewn on a nylon sports bag as described above, comply with the country of origin marking requirements of the law and regulations?

Law and Analysis:

Section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304) generally requires that every article of foreign origin or its container imported into the U.S. must be legibly, permanently and conspicuously marked to indicate the English name of the country of origin to a ultimate purchaser in the U.S. The country of origin marking requirements are set forth in Part 134, Customs Regulations (19 CFR Part 134). The Customs Service has interpreted the requirement that articles be marked conspicuously to mean that they must be marked in a place where the ultimate purchaser would be able to

find the marking easily and read it without strain. (See 19 CFR 134.41(b)).

Holding:

Under the facts in this case, we are of the opinion that the sports bag in question is not conspicuously marked, and that the country of origin marking must be placed in another location on the bag.

(C.S.D. 89–47)

Marking: Country of origin marking of Delta Joists (steel roofing structural components).

Date: December 8, 1988
File: MAR 2–05 CO:R:C:V 731768 LR

MR. DALE R. CARLSON, P.E.
BUILDINGS DIVISION
MANUFACTURING PROJECTS MANAGER
BUTLER MANUFACTURING CO.
BMA Tower, Penn Valley Park
Kansas City, MO 64141

DEAR MR. BUTLER:

This is in response to your letter dated September 9, 1988, requesting a ruling on the country of origin marking requirements applicable to Delta Joists to be imported by your company from Mexico.

Delta Joists are steel roofing structural components which are imported in lengths from 20 to 60 feet. According to your letter, the joists will be ordered in specific lengths, structural design and quantities for specific construction projects. For every order placed with the manufacturer you will have a specific customer and construction site address as the final destination of these parts. You also indicate that the joists are normally imported in bundles of 10. Based on the photographs you submitted, it appears that the bundles are held together by means of metal bands.

It is your proposal that in lieu of marking each joist with the country of origin, only the top one in each open package (normally of 10) be marked. The country of origin would appear in blue lettering on a yellow pressure sensitive label measuring 1" × 5½" which would be clearly visible and always in the same location at one end of each bundle of joists. The label would also contain "BUTLER" "DELTA JOIST" and the part number.

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires, subject to certain specified exceptions, that every article of foreign origin imported into the U.S. be marked in a conspicuous

place as legibly, indelibly, and permanently as the nature of the article will permit in such manner as to indicate to an ultimate purchaser in the U.S, the English name of the country of origin of the article. Pursuant to 19 U.S.C. 1304(a)(3)(D) and section 134.32(d), Customs Regulations (19 CFR 134.32(d)), an exception from individual marking is applicable where the marking of a container of such article will reasonably indicate the origin of such article. This exception is normally applied in cases where the imported article(s) is imported in a properly marked container and Customs officials at the port of entry are satisfied that the ultimate purchaser, *i.e.*, the last person in the U.S. to receive the article in the form in which it was imported, will receive it in its original unopened marked container. We believe that the proposed method of marking the top joist in a bundle of joists in lieu of each individual joist is akin to the marking of a container in lieu each individual article. Accordingly, the proposed method of marking is acceptable if it will reasonably indicate the country of origin of the joists to the ultimate purchaser.

In this case, we consider the construction company that utilizes the joists to be the ultimate purchaser. So long as the joists are imported and sold only in bundles that are securely affixed by metal bands or otherwise and marked in the manner described above, and Customs officials at the port of entry are satisfied that the marking is legible, permanent and conspicuous and that the construction company will receive them in this fashion, we are of the opinion that the proposed marking satisfies the statutory requirements. Based on your representation that the joists are custom ordered in specific lengths, structural design and quantities for specific construction projects, we believe that it is unlikely that an unmarked joist would be removed from the marked bundle and sold individually. Customs officials may require an affidavit to this effect upon importation.

(C.S.D. 89–48)

Marking: Country of origin marking of wooden pens.

Date: December 9, 1988
File: MAR 2–05 CO:R:C:V 731799 LR
Category: Marking

RAYMOND R. DRISCOLL
DEVELOPMENT DIRECTOR
FALCON RULE
Auburn, Maine 04210

Re: Country of Origin Marking of Wooden Pens.

DEAR MR. DRISCOLL:

This is in response to your letter dated September 14, 1988, requesting a ruling on the marking requirements for wooden pens imported from Taiwan which are printed after importation with advertising information.

Facts:

Wooden pens in the shape of baseball bats, hockey sticks and rulers are imported from Taiwan. After importation your company prints the pens with advertising information in accordance with individual purchase contracts and sells them to advertising specialty distributors. According to your letter, the pens are imported and sold in poly bags of 50 in each bag. In lieu of marking each pen with the country of origin, you propose marking the poly bags.

Issue:

Are wooden pens which are made in Taiwan and printed in the U.S. with advertising information excepted from individual country of origin marking requirements?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the U.S. subject to certain specified exceptions, shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. "Ultimate purchaser" is defined in section 134.1, Customs Regulations (19 CFR 134.1), as the "the last person in the U.S. who will receive the article in the form in which it was imported." The regulation further provides that if an imported article will be used in manufacture, the manufacturer may be the "ultimate purchaser" if he subjects the imported article to a process which results in a substantial transformation of the article. In such case, the imported article is excepted from individual marking pursuant to section 134.35, Customs Regulations (19 CFR 134.35), and only the outermost container is required to be marked.

However, if the manufacturing process is a minor one which leaves the identity of the imported article intact, 19 CFR 134.1 provides that the consumer or user of the article, who obtains the article after the processing, will be regarded as the "ultimate purchaser". The regulation also provides that if the imported article is distributed as a gift the recipient is the "ultimate purchaser". In each of these instances, the article must be individually marked with the country of origin.

In order for a substantial transformation to be found, an article having a new name, character, or use must emerge from the processing. *See United States* v. *Gibson-Thomsen Co. Inc.*, 27

C.C.P.A. 267 (C.A.D. 98). Two factors that are relevant to the issue of substantial transformation are whether the processing done in the U.S. substantially increases the value of the imported article or transforms the article so that it is no longer the essence of the final product. *See National Juice Products Association* v. *United States*, 10 CIT ——, 628 F. Supp. 978 (1986).

In this case, we find that the printing of advertising information on the pens does not constitute a substantial transformation. First, the printing does not materially alter the name, character or use of the imported articles. At the time of importation, the articles in question would properly be referred to as pens and more specifically characterized as wooden pens in the shape of baseball bats, hockey sticks and rulers. The use of the pens is as writing implements. After the printing of the advertising information, they remain articles properly referred to as pens, characterized as wooden pens in the shape of baseball bats, hockey sticks and rulers, and used as writing implements. The fact that the pens may also be used for advertising purposes, does not, in our opinion, materially change their underlying use as writing implements.

For these same reasons, we believe that the printing does not transform the imported article so that it is no longer the essence of the final product. Both before and after the printing, the essence of the article in question is a finished writing implement with an unusual shape. It is also unlikely that the printing substantially increases the value of the product. Based on these considerations, we find that printing is merely a minor manufacturing process which leaves the identity of the imported articles intact. As such, the recipient of the pens (even if they are distributed as gifts), rather than the company that prints the pens, or the companies that distribute them, is considered the ultimate purchaser.

Holding:

Wooden pens in the shape of baseball bats, hockey sticks and rulers, which are made in Taiwan are not substantially transformed in the U.S. by printing advertising information on them. Accordingly, the final recipient of the pens, rather than either the U.S. company that prints the pens or the companies that distribute them to the final recipient, is the ultimate purchaser. Therefore, each pen must be individually marked in the manner set forth in 19 U.S.C. 1304 and 19 CFR Part 134.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89–52)

TOSHIBA CORP., TOSHIBA AMERICA, INC., AND TOSHIBA HAWAII, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 86–10–01285

OPINION

[Plaintiffs motion for partial summary judgment denied in part, granted in part; defendant's motion to reject plaintiffs' letter request denied; plaintiffs' motion for a schedule of review results denied in part, granted in part.]

(Decided April 24, 1989)

Arent, Fox, Kintner, Plotkin & Kahn (*Robert H. Huey, Eleanor Pelta*), for the plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Jeanne E. Davidson*), Civil Division, United States Department of Justice, and (*Joan MacKenzie* of counsel), United States Department of Commerce, for the defendants.

BACKGROUND

MUSGRAVE, *Judge:* Plaintiff Toshiba is subject to T.D. 71–76, an antidumping finding covering television receivers, monochrome and color, from Japan. 36 Fed. Reg. 4597 (1976).

On April 28, 1980 plaintiffs and other respondents entered into settlement agreements with the United States Department of Commerce ("Commerce") providing that the U.S. would forego its claim for duties assessed under T.D. 71–76 with respect to entries of televisions imported from Japan on or before March 31, 1979, in exchange for specified payments to the U.S.

Commerce subsequently undertook to conduct periodic administrative reviews of T.D. 71–76, in accordance with 19 U.S.C. § 1675(a), for the purpose of determining the amount of any antidumping duties to be assessed on television receivers from Japan after March 31, 1979.

On June 5, 1981 Commerce completed its first review for the period April 1, 1979 through March 31, 1980, and found that plaintiff's exports of television receivers were sold at or above fair value. 46 Fed. Reg. 30,163 (1981). On April 1, 1982 plaintiff applied for revo-

cation of T.D. 71–76 as to it, and submitted assurances that it would not dump in the future. On August 18, 1983 Commerce published its preliminary results for the period from April 1, 1980 through March 31, 1981—the second review period—finding no dumping margins for plaintiff. 48 Fed. Reg. 37,506 (1983). On September 27, 1983 Commerce published its preliminary results for the third review period, April 1, 1981 through March 31, 1982, again finding no dumping margin for plaintiff. 48 Fed. Reg. 44,100 (1983). On that same day Commerce published its tentative determination to revoke T.D. 71–76 as to plaintiffs. 48 Fed. Reg. 44,101 (1983). As required by 19 C.F.R. § 353.54 the notice stated that final revocation would not issue until reviews were completed for the gap period—"the time between the last review conducted giving rise to the tentative decision to revoke, and the date that tentative determination was published." *Matsushita Elec. Indus. Corp.* v. *U.S.*, 12 CIT ——, 688 F. Supp. 617 (1988), *aff'd*, 861 F.2d 257 (Fed Cir. 1988).

Since September 27, 1983 Commerce has published its final determination in the second review on June 10, 1985, approximately two years after the preliminary determination, confirming zero margins for plaintiff. 50 Fed. Reg. 24,278 (1985). On March 20, 1987 Commerce published its final determination in the third review, over three years after the preliminary, again confirming zero margins for plaintiff. 52 Fed. Reg. 8940 (1987). The preliminary determination for the fourth review was published on December 30, 1988, with a finding of no dumping margins. 53 Fed. Reg. 53,043 (1988). The partial fifth review, covering shipments up to the date of notice of tentative revocation, September 27, 1983, was initiated on July 9, 1986. 51 Fed. Reg. 24,883 (1986).

Since publication of its tentative determination to revoke as to plaintiffs, Commerce also initiated reviews of Toshiba merchandise under T.D. 71–76 for periods after September 27, 1983. However, on March 2, 1987 this Court granted plaintiffs' application for a preliminary injunction enjoining Commerce from conducting annual reviews under T.D. 71–76 as to Toshiba for periods subsequent to the date of tentative revocation, September 27, 1983, until Commerce made a final determination on revocation. *Toshiba Corp., et al.* v. *U.S.*, 11 CIT ——, 657 F. Supp. 534 (1987). Commerce appealed this decision to the Court of Appeals for the Federal Circuit, which reversed the preliminary injunction, finding that plaintiffs had not demonstrated irreparable injury sufficient to warrant such relief. *Sharp* v. *U.S.*, 837 F.2d 1058 (Fed. Cir. 1988).

On January 29, 1988 plaintiffs moved this Court for leave to file a Motion for Partial Summary Judgment on the issues of Commerce's authority to conduct post-tentative revocation reviews and defendant's delay in completing outstanding administrative reviews.

On February 17, 1988 defendant filed its response to plaintiff's Motion for Leave to File a Motion for Partial Summary Judgment and itself filed a Motion to Stay Proceedings pending the issuance

of a decision in *Matsushita Electric Industrial Corp.* v. *U.S.*, CIT Court No. 86–07–00902.

On March 28, 1988 plaintiffs sent a letter to the Court requesting that the Court act expeditiously with respect to the two pending motions. On April 6, 1988 defendant moved this Court to reject plaintiff's letter request and to purge all copies of the letter from the Court's files.

On December 13, 1988 plaintiffs filed a Motion for a Schedule of Publication of Review Results.

This case was re-assigned to these chambers on December 16, 1988.

At this time all of the above-mentioned motions remain pending. However, defendant's Motion to Stay Proceedings pending the issuance of *Matsushita* has been rendered moot, as an opinion was issued in that case on May 25, 1988, *Matsushita Elec. Indus. Corp.* v. *U.S., supra,* and that motion has since been withdrawn by defendant.

Discussion

In plaintiffs' Motion for Partial Summary Judgment, plaintiffs seek permanent injunctive relief against Commerce, enjoining it from conducting administrative reviews under T.D. 71–76 as to Toshiba for periods following September 27, 1983, the date of tentative revocation as to Toshiba, until Commerce has completed the pending administrative reviews for periods preceding and ending with September 27, 1983 and until defendant has rendered a decision on whether to grant or deny final revocation of T.D. 71–76 as to Toshiba. Plaintiffs further seek an order directing defendant to complete the outstanding review of periods prior to September 27, 1983 and to issue a decision on final revocation to take effect as of September 27, 1983 pursuant to a schedule that the Court shall deem appropriate. This request seeks the same relief as plaintiffs' most recent Motion for a Schedule of Publication of Review Results and will therefore be considered jointly below.

The Court turns first to plaintiffs' request for permanent injunctive relief. Plaintiffs argue that until Commerce finalizes its decision on revocation, Commerce lacks the authority to conduct reviews of T.D. 71–76 as to Toshiba for periods subsequent to September 27, 1983, the date of tentative revocation. This argument has already been considered and rejected in a recent case of this Court which is factually similar to our own, *Matsushita Elect. Indus. Corp.* v. *U.S., supra,* in which the Court stated:

> after carefully analyzing the regulations and judicial decisions, the Court concludes that it would be erroneous to read into the regulations a restriction against conducting a post-tentative revocation review. *Id.* at ——, 688 F. Supp. at 624.

This decision was affirmed by the CAFC, which stated:

> We are not suggesting, however, that Commerce may never consider data concerning events after publication of the tentative decision to revoke * * * we cannot say that in order to determine whether there is 'no likelihood of resumption of sales at less than fair value,' the Secretary may not consider events after the date of the tentative revocation decision. The extent to which such post-tentative revocation decision data are required is a matter largely within the Secretary's discretion, and the answer depends upon the facts of the particular case.

Matsushita Elec. Indus Corp. v. *U.S.*, 861 F.2d 257, 260 (Fed. Cir. 1988) (quoting *UST, Inc.* v. *U.S.*, 831 F.2d 1028, 1033 (Fed. Cir. 1987)). Plaintiffs' request for permanent injunctive relief is denied.

As for defendant's motion to reject plaintiffs' letter request of March 28, 1988, the Court denies this motion but points out that this letter is not part of the record in this case and has not been considered by the Court in its determination.

In plaintiffs' most recent motion the Court is requested to order a schedule mandating that Commerce complete and publish final results for the fourth, partial fifth, and ninth reviews,[1] as well as the third country shipments investigation, and to render a decision on final revocation of T.D. 71–76 as to Toshiba by March 1, 1989. With respect to the fourth review, the matter has been rendered moot, as Commerce published the preliminary determination for this review on December 30, 1988. 53 Fed. Reg. 53043 (1988).

Defendant opposes this motion on the grounds that plaintiffs have failed to meet the burden of demonstrating that such an exercise of the Courts power is warranted. Defendant asserts that it is in the process of completing all of the T.D. 71–76 administrative reviews, including those of plaintiffs' sales, and that there is no justification for the Court to interfere in the agency's management of its own proceedings.

The CAFC has acknowledged that the determination as to whether Commerce should be ordered to decide outstanding administrative reviews or to issue a final decision on revocation is a matter clearly left to this Court's sound discretion.

> The government has recognized the power of the Court of International Trade to grant such affirmative relief in appropriate circumstances. The determination whether to do so and the terms and conditions of any directive to Commerce are matters for the Court of International Trade to determine in the first instance, in the exercise of its sound discretion.

Sharp v. *U.S., supra,* at 1064; *see also, Matsushita,* 861 F.2d 257 (1988).

---

[1]Although Commerce announced the initiation of the sixth, seventh, and eighth reviews, no action was ever taken in connection with these reviews as Commerce determined that the only reviews that must be concluded prior to final revocation are those leading up to the date of the tentative revocation, and the review of the most recent period.

It should also be noted that neither this Court nor the Court of Appeals look favorably upon the prolonged delays in Commerce's administration of its administrative reviews. In *UST, supra*, the Court indicated its concern "about Commerce's lengthy and seemingly unwarranted delay" stating that "[t]he failure promptly to determine whether to make final a tentative decision to revoke is particularly troublesome." *Id.* at 1032. The additional litigation which results "would be unnecessary if Commerce moved with proper dispatch." *Id.; see also Matsushita*, 688 F. Supp. 617 at 625 ("it is outrageous to contemplate the length of delay in the administration of T.D. 71–76 and the absurd delay should not be tolerated further").

In an opinion affirmed by the Court of Appeals for the Federal Circuit, the Court in *Matsushita* exercised its discretion in ordering Commerce to complete certain outstanding reviews by a date determined by the Court.

All controversies must come to an end sometime; this Court hereby orders that Commerce complete and publish final results for the partial fifth and ninth reviews, or alternatively it may, in its discretion, abandon these reviews, and to render a decision on final revocation of T.D. 71–76 as to plaintiffs by December 1, 1989.

(Slip Op. 89–53)

TAI YANG METAL INDUSTRIAL CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–05–00374

[Judgment for defendant; action dismissed.]

(Decided April 24, 1989)

Davis Wright & Jones (*David Simon*) for plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *Tina M. Stikas*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff Tai Yang Metal Industrial Co., Ltd. (Tai Yang) challenges the first final review determination of the Department of Commerce, International Trade Administration (Commerce), in *Malleable Cast-Iron Pipe Fittings, Other Than Grooved, From Taiwan*, 53 Fed. Reg. 16,179 (May 5, 1988). Two main issues are in contention: (1) whether Commerce's refusal to postpone issuance of a review determination pending a judicial opinion on a challenge to the underlying less than fair value (LTFV) determination is an error of law or an abuse of discretion; (2) whether, for purposes of making the review determination, it was unlawful for Com-

merce to use the antidumping duty margin found for plaintiff in the underlying LTFV investigation as the best information available.

BACKGROUND

Plaintiff is a foreign manufacturer and exporter of malleable cast-iron pipe fittings from Taiwan. Commerce found an antidumping duty margin of 37.09 percent against plaintiff in the original LTFV investigation. 51 Fed. Reg. 18,918 (May 23, 1986). Plaintiff challenged this determination, alleging but for errors in Commerce's use of averaging methodology and in Commerce's comparison of United States price to an average home market price, the dumping margin would have been lower. During the pendency of this action, plaintiff's sole United States importer requested an administrative review of entries for the first review period.

Commerce initiated the review in accordance with 19 U.S.C. § 1675 (1982 & Supp. V 1987) and served the questionnaire on plaintiff. Plaintiff failed to supply any information, explaining that "[t]he company lacks the resources to repeat the gargantuan effort of the fair-value investigation for an investigation period some three times larger than that in the original case." *Tai Yang's Brief in Support of Motion for Judgment Upon Agency Record,* Exhibit C at 2 (*Plaintiff's Brief*). Commerce warned plaintiff that failure to respond to the questionnaire may result in adoption of the antidumping duty margin established in the challenged LTFV determination. *Id.* at 3.

In view of plaintiff's failure to furnish any data on entries that would have been the subject of the review, Commerce used, as the best information otherwise available pursuant to 19 U.S.C. § 1677e(b) (1982), the 37.09 percent antidumping duty margin imposed on plaintiff from the underlying LTFV investigation. In adopting this margin, Commerce referred to the antidumping duty order published in the Federal Register on May 23, 1986 (51 Fed. Reg. 18,918), without reexamining the record in the original dumping determination.

When the final determination in the first administrative review was published on May 5, 1988 (53 Fed. Reg. 16,179), a decision had not yet been rendered in the action challenging the LTFV determination.

Presently before the Court is plaintiff's challenge to the results of the first administrative review. Several points need to be highlighted. The record before the Court is devoid of specific data on entries which were the subject of the LTFV investigation, as well as on those entries which would have been the subject of the review. In light of the sparseness of record on which the Court must base its decision, plaintiff previously made a motion to consolidate the original and the present actions. Consolidation would have permitted plaintiff to revive the claims raised in the initial litigation. This motion was denied on September 21, 1988 on the grounds that the pub-

lication of the final review determination caused the issues in the original suit to become moot.

Plaintiff now urges the Court to rule that the statutory scheme under 19 U.S.C. § 1516a (1982) directs Commerce to stay publication of the review results until the judicial outcome in the challenged LTFV determination. Alternatively, plaintiff argues that this statute obliges Commerce to reassess the challenged determination during review, thereby incorporating the record from the LTFV investigation into the record in the administrative review. Plaintiff contends one of these two courses of action, both of which lead to judicial review of the underlying LTFV determination, is necessary for purposes of lawful assessment of duties on the subject merchandise. The Court will address each of these claims after a brief discussion of the appropriate standard of review.

Discussion

I. *Standard of Review*

Commerce's actions must be upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Extensive legislative trust in the administering authority's expertise means that any judicial review of agency determination is a limited one. The reviewing court must give "tremendous deference" to the findings of the agency charged with making determinations under our trade laws. *Alberta Pork Producers' Marketing Bd.* v. *United States,* 11 CIT ——, 669 F. Supp. 445, 449 (1987) (citing *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983); *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 524, 622 F. Supp. 1071, 1075 (1985)). Accordingly, the Court will not displace a decision of Commerce which is reasonable under the circumstances of this case.

II. *Staying the Review Proceeding*

Plaintiff first argues that postponing the publication of the review determination is within the scope of Commerce's discretionary authority, and that 19 U.S.C. § 1516a requires Commerce to exercise this power. Defendant counters that Commerce does not possess any authority to delay completion of an administrative review because 19 U.S.C. § 1675 directs Commerce to complete administrative reviews within the statutory period of twelve months. In the alternative, defendant argues Commerce's actions are reasonable because judicial opinion on the challenged LTFV determination would not be dispositive with regard to entries presently under the administrative review.

In 1984 Congress amended 19 U.S.C. § 1675(a)(1) to make annual reviews optional, rather than mandatory. This provision now provides that Commerce will conduct an administrative review "if a request for such a review" is made. Notwithstanding this change, the language that a review, if undertaken, will take place during a "12-

month period" was retained. *Id.* The caselaw teaches that statutory time limits in general are directory, rather than mandatory, when the administering authority is not explicitly prohibited from exceeding the time period and "no adverse consequences are imposed for the delay." *Philipp Bros., Inc.* v. *United States,* 10 CIT 76, 82, 630 F. Supp. 1317, 1323 (1986); *see American Permac, Inc.* v. *United States,* 10 CIT 535, 539, 642 F. Supp. 1187, 1191 (1986). Defendant does not claim that the statute in question either restricts Commerce from acting beyond the twelve-month period or prescribes adverse consequences for the delay. Indeed, Commerce has deferred completion of reviews on several occasions, attesting to Commerce's discretionary power in this area.

Contrary to plaintiff's argument, however, juxtaposition of discretionary authority under 19 U.S.C. § 1675(a)(1) with 19 U.S.C. § 1516a(c) does not compel Commerce to suspend publication of the completed review. 19 U.S.C. § 1516a(c), titled "Liquidation of entries," states that *unless enjoined,* the entries subject to a determination of Commerce will be liquidated, or finally assessed with actual dumping duties, consistent with the determination. *See Silver Reed America, Inc.* v. *United States,* 9 CIT 221 (1985). Plaintiff reads this provision to mean that the entries which are enjoined while the original LTFV determination is being judicially reviewed "shall be liquidated in accordance with the outcome of the appeal on the merits." *Plaintiff's Brief* at 5. The Court finds that such construction does not apply to the present case.

In interpreting 19 U.S.C. § 1516a(c), plaintiff rests its case on the different conclusions reached in *Fundicao Tupy S.A.* v. *United States,* 11 CIT ——, 669 F. Supp. 437 (1987) and *Oki Elec. Indus. Co.* v. *United States,* 11 CIT ——, 669 F. Supp. 480 (1987).[1] *Fundicao Tupy* establishes a request for a review as a prerequisite to injunctive remedy pursuant to 19 U.S.C. § 1516a(c), whereas *Oki* obviates a request for a review prior to granting motion for injunctive relief. Plaintiff claims a request for an administrative review was made to avoid any adverse consequence that plaintiff may experience, although it believed that *Oki* should govern this case. *See Plaintiff's Brief* at 16; *Id.*, Exhibit C at 2.

The divided authority in the Court may not be relied on to explain plaintiff's position, however, because plaintiff never applied for an injunctive remedy. Even as to *Oki,* a motion for injunctive relief is a necessary and indispensable requirement for obtaining liquidation consistent with judicial disposition of the LTFV determination. Plaintiff's course of action is thus deficient for purposes of benefitting from the *Oki* rationale.

---

[1] *NTN Bearing Corp. of America* v. *United States,* 12 CIT ——, slip op. 88–161 (Nov. 23, 1988), *appeal docketed,* No. 89–1121 (Fed. Cir. Nov. 30, 1988), follows the rationale articulated in *Fundicao Tupy,* whereas *Ipsco, Inc.* v. *United States,* 12 CIT ——, 693 F. Supp. 1368 (1988), and *Sonco Steel Tube Div.* v. *United States,* 12 CIT ——, 698 F. Supp. 927 (1988) adopt the *Oki* reasoning. The Court's bifurcated authority on this matter is currently the subject of appeal in the Court of Appeals for the Federal Circuit.

To the extent plaintiff requested a review, the results of the review will govern liquidation because publication of the administrative review prior to the court's issuance of a decision on the challenged underlying LTFV determination renders those issues moot. *PPG Industries, Inc.* v. *United States*, 11 CIT ——, 660 F. Supp. 965 (1987). The LTFV determination generally covers entries made from a period prior to the filing of the petition to one month thereafter, whereas the first review period typically covers entries made from the date of the preliminary affirmative determination to the publication of the antidumping duty order. 19 C.F.R. § 353.53a(b)(2) (1988).[2] Principally for this reason,[3] the results of a review determination, grounded on more recent entries, supersede the underlying LTFV determination. *See Silver Reed America*, 9 CIT at 224; *see also Fabricas El Carmen, S.A.* v. *United States*, 12 CIT ——, slip op. 88–20 (Feb. 17, 1988); *Agrexco Agricultural Export Co.* v. *United States*, 12 CIT ——, slip op. 88–52 (May 4, 1988); and *Alhambra Foundry* v. *United States*, 10 CIT 330, 635 F. Supp. 1475 (1986).

An exception exists if the Court finds, prior to the publication of the review, that the underlying antidumping duty order itself is invalid or that the dumping margin is *de minimus*. Even under this narrowly circumscribed exception, however, Commerce is not prevented from publishing the review results, since the outcome and timing of the final decision of the Court is indeterminative as of the time of the publication of the review. In the event the Court finds a *de minimus* dumping margin or that the duty order is invalid, plaintiff will not have suffered adverse consequences as a result of publication of the review. Where the Court affirms the LTFV determination of Commerce, a plaintiff dissatisfied with the results of the review retains an opportunity to challenge it in a separate action, whose scope is limited to the administrative record before the agency at the time of that determination. *Id.; Beker Indus. Corp.* v. *United States*, 7 CIT 313 (1984); S. Rep. No. 96–249, 96th Cong., 1st Sess. 247–52 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 633–38. For the foregoing reasons, Commerce was not obliged to adjourn the publication of the review determination.

---

[2]The original dumping margin of 37.09 percent was based upon an investigation of plaintiff's entries during the period February 1, 1985 through July 31, 1985. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* at 6, n.2. The review, on the other hand, covered the period January 14, 1986 through April 30, 1987. 53 Fed. Reg. at 16,180.

[3]Under the governing statutes, publication of an antidumping order pursuant to an affirmative LTFV determination only establishes the amount of estimated dumping duties importers must deposit on entries pending liquidation. Such duty deposits must be retrospectively made from the publication of the preliminary affirmative determination, marking the point at which liquidation is suspended, and prospectively on all future entries. *See* 19 U.S.C. §§ 1673b(d), 1673e, and 1673f (1982). Ascertainment of the accuracy of the estimated duties for purposes of actual assessment of duty occurs during review of the antidumping determination and order. *See* 19 U.S.C. § 1675(a). Liquidation is conducted pursuant to this proceeding.

In the event a request for a review is not made, the entries which would have been the subject of the review are liquidated consistent with the original antidumping duty order. *See* 19 C.F.R. § 353.53a(d)(1) (1988)

III. *Record in Review Determination*

A. Best Information Available

The second contention pertains to Commerce's use of the dumping margins from the underlying LTFV investigation as the best information available for review determination. Plaintiff complains it was unreasonable for Commerce to rely on these figures without contemporaneously incorporating into the record in review the information from the LTFV investigation. Commerce counters its actions are consistent with 19 U.S.C. § 1677e(b) and the agency's general policy.

19 U.S.C. § 1677e(b) provides:

> (b) Determinations to be made on best information available
>
> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses *or is unable to produce information requested* in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available. (Emphasis provided).

This provision confers broad authority upon Commerce to use the "best information otherwise available rule" to facilitate timely completion of administrative proceedings. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556 (Fed. Cir. 1984). Additionally, "Commerce may exercise discretion in determining what is the best information available when an exporter or manufacturer has failed to supply requested information." *Chemical Prods. Corp.* v. *United States,* 10 CIT 626, 634, 645 F. Supp. 289, 295 (1986).

When respondents are unwilling or unable to participate fully in a review, Commerce's policy is to utilize margins from the most recently determined duty rate as the best information available, without reexamining the accompanying record. *See, e.g., Final Results of Antidumping Duty Administrative Review; Steel Jacks from Canada,* 52 Fed. Reg. 32,957 (Sept. 1, 1987); *Bicycle Tires and Tubes from Taiwan; Final Results of Antidumping Duty Administrative Review,* 51 Fed. Reg. 43,752 (Dec. 4, 1986).

It is not controverted that Commerce lacked specific information on the entries that were subject to review because plaintiff did not submit *any data* concerning these entries. Plaintiff belatedly communicated that it "was unable to respond to the questionnaire because it lacked the manpower to assemble the information." *Plaintiff's Brief* at 3. Plaintiff does not appear to dispute the validity of Commerce's policy in question, but rather attempts to except itself with the argument that application of such policy is unreasonable when poor financial health is the cause of unresponsiveness.

While budgetary constraint may in fact underlie plaintiff's lack of cooperation in the review, this cannot form an exception to "the best information available rule." The overriding purpose of this

broadly enunciated rule is to alleviate the burden on Commerce to meet statutory deadlines. This objective would be significantly impeded with accommodation of every individualized demand that respondents raise.[4] Therefore, it was reasonable for Commerce to use the margins from the LTFV determination.

B. 19 U.S.C. § 1516a(c)

Plaintiff alternatively justifies its non-participation in the review on the grounds that 19 U.S.C. § 1516a(c) "does not envision that the appellant-exporter (or appellant-importer) will have to create a new record in the [administrative] review in order to obtain liquidation in accordance with the court's decision" in the challenged LTFV determination. *Plaintiff's Brief* at 19. This theory is statutorily infirm.

To the extent plaintiff failed to apply for injunctive relief, rehabilitating 19 U.S.C. § 1516a(c) in this fashion is manifestly erroneous. Under these facts, if judgment in favor of defendant leads to liquidation consistent with the review determination, which is effectively identical to the LTFV determination, it is a foreseeable and avoidable consequence of plaintiff's own failure to adequately safeguard its rights.

Conclusion

Upon review of the administrative record, the Court finds Commerce acted reasonably and within the bounds of its discretion in declining to stay the publication of final results in the first review determination. The Court further concludes it was reasonable for Commerce to rely upon the published margin from the LTFV investigation as the best information available, without reassessing the record therefrom. Accordingly, plaintiff's motion for judgment upon the agency record is denied, and the action is dismissed.

[4]The Court does not perceive a need to rely on the additional grounds upon which Commerce urges dismissal. Commerce explains plaintiff itself could have incorporated into the review record the information from the LTFV investigation in two ways: plaintiff could have (1) made a timely request that Commerce reassess the LTFV determination; or (2) taken the initiative of resubmitting the record in the original investigation to ensure judicial consideration of the LTFV determination. The Court questions the wisdom of making these procedures available on a comprehensive basis because they may be misused, effectively divesting the review proceedings of any substantive content. In this regard, plaintiff's comment is instructive: a request for a review is merely "a formality that must be complied with in order to obtain liquidation in accordance with the results of the appeal from the underlying LTFV investigation * * *. To require that Tai Yang develop a full record in the [administrative] review in order to obtain a decision under merits in the appeal from the underlying LTFV determination is nonsensical." *Plaintiff's Brief* at 20; *see Plaintiff's Reply Brief* at 5.

(Slip Op. 89–54)

FORMER EMPLOYEES OF BASS ENTERPRISES PRODUCTION CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 87–04–00584

After two remands to the Department of Labor and a new investigation, a petition for trade adjustment assistance was granted. The action to challenge the denial of certification for trade adjustment assistance benefits is accordingly dismissed.

[Action dismissed.]

(Decided April 26, 1989)

Charles E. Williams, pro se, for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Labor (*Gary E. Bernstecker*), for defendant.

DICARLO, *Judge:* After two remands to the United States Department of Labor (Labor) and a new investigation, plaintiffs were certified as eligible for trade adjustment assistance benefits under 19 U.S.C. § 2272 (1982 & Supp. IV 1986), *as amended* by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1421, 102 Stat. 1107, 1242–44 (1988). The action in this Court to challenge the denial of certification for trade adjustment assistance is accordingly dismissed.

BACKGROUND

In *Bass I,* the court found that Labor (a) denied plaintiffs their due process in not giving actual notice of the 10-day period in which to request a hearing, and (b) did not support its denial of certification with a reasoned analysis. The court vacated the denial of certification for trade adjustment assistance benefits and remanded for a new investigation. *Former Employees of Bass Enter. Prod. Co.* v. *United States,* 12 CIT ——, 688 F. Supp. 625, 632 (1988) (*Bass I*), *motion to stay remand denied,* 12 CIT ——, 688 F. Supp. 1550 (1988) (*Bass II*), *rehearing on motion to stay remand denied,* 12 CIT ——, 691 F. Supp. 373 (1988) (*Bass III*).

In *Former Employees of Bass Enter. Prod. Co.* v. *United States,* 13 CIT ——, Slip Op. 89–9 (Jan. 24, 1989) (*Bass IV*), the court vacated the remand results from the investigation following *Bass I. Bass IV* held that (1) a statement by defendant's counsel that it is unlikely that plaintiffs could satisfy the first criterion for assistance did not amount to a finding by Labor that a significant number of workers have been or are threatened with separation; (2) although sales or production of oil increased, the trade adjustment assistance statute requires Labor to examine sales or production of the firm or subdivision rather than only one of two related products which are each important to the firm where the petitioning workers produce both articles; and (3) that Labor did not apply retroactive statutory changes mandated in the Omnibus Trade and Competitiveness Act

of 1988, Pub. L. No. 100–418, § 1421(a), 102 Stat. 1107, 1242–43 (1988), which changed the criterion for oil and gas workers. The court accordingly vacated and remanded for redetermination of eligibility for trade adjustment assistance.

DISCUSSION

In the second remand results, Labor found that the major share of Bass' 1985 sales decline was accounted for by decreased gas sales. *Bass Enterprises Production Co., Fort Worth, TX; Revised Determination on Remand,* 54 Fed. Reg. 12,497 (Mar. 27, 1989). Labor obtained additional and corrected information from a major gas customer who accounted for a major share of Bass' sales decline of gas in 1985 compared to 1984. *Id.* at 12, 497. The corrected information showed that customers accounting for a major share of the decline in Bass' 1985 gas sales had purchased increased quantities of imported gas in 1985 compared to 1984. *Id.* at 12,497–98.

In the second remand Labor found that worker separations began in 1985, and that production worker employment decreased in 1986 from 1985. *Id.* at 12,498. Labor also found that company sales and production of gas decreased in 1986 compared to 1985, and that company sales and production of gas decreased in quantity and value in 1985 and 1986. *Id.*

The Court also remanded for Labor to examine unanswered charges that Labor's investigation was biased against granting adjustment assistance. *Bass IV,* 13 CIT at ——, Slip Op. 89–9 at 14–16. Labor made an inquiry into the allegations of bias but found none. Labor did find, however, that "some inadvertent miscommunication and misunderstanding between the petitioner and staff may have occurred." 54 Fed. Reg. at 12,498.

CONCLUSION

After review of additional and corrected facts obtained after the second remand, Labor concluded that increased imports of gas like or directly competitive with the gas produced at Fort Worth, Texas contributed importantly to worker separations and to declines in production and employment at Bass Enterprises Production Company in Fort Worth. Labor then certified workers at that facility who were separated from employment between August 16, 1985 and January 1, 1987. The action challenging the denial of certification for trade adjustment assistance is accordingly dismissed.

(Slip Op. 89–55)

SONY CORP. OF AMERICA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, ET AL., DEFENDANT-INTERVENORS

Court No. 88–02–00120

[Plaintiff's motion for judgment on the agency record is denied.]

(Decided April 26, 1989)

O'Melveny & Myers (*Kermit Almstedt, Gary Horlick,* and *Jerome Lehrman*) for plaintiffs.

Lyn Schlitt, General Counsel, *James Toupin,* Assistant General Counsel, (*George Thompson*) for the U.S. International Trade Commission, defendant.

Collier, Shannon, Rill & Scott (*Paul Cullen, Laurence Lasoff*) for defendant-intervenors.

OPINION

MUSGRAVE, *Judge:* Plaintiff Sony Corporation of America ("Sony") moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record of the final determination by the United States International Trade Commission ("the Commission") in *Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore,* Inv. Nos. 731–TA–367 through 370 (Final), USITC Pub. 2046 (1987), 52 Fed. Reg. 49, 209 (1987). The Court has jurisdiction under 28 U.S.C. § 1581(c) (1982).

BACKGROUND

On November 26, 1986 an antidumping petition was filed against imports of color picture tubes (CPTs) from Canada, Japan, the Republic of Korea, and Singapore. The Commission published notice on December 8, 1986 that it was instituting a preliminary investigation, 51 Fed. Reg. 44,130 (1986), and determined on January 22, 1987 that there was a reasonable indication that an industry in the U.S. was materially injured, or threatened with material injury, by reason of imports of CPTs from the subject countries that were allegedly being sold at less than fair value (LTFV). 52 Fed. Reg. 2459 (1987). Following an affirmative preliminary determination by the Department of Commerce ("Commerce") of sales of imports of CPTs at LTFV, 52 Fed. Reg. 24,320 (1987), the Commission instituted a final injury investigation, 52 Fed. Reg. 28,353 (1987), while Commerce conducted a final investigation of whether LTFV sales were occurring. On November 18, 1988 Commerce issued its final determination that imports of CPTs from the subject countries were being sold in the U.S. at less than fair value.

After Commerce's final determination the Commission considered whether the imports subject to the Commerce determination were a cause of material injury or threat thereof to an industry in the United States. The Commission held a public hearing on November 19, 1987 at which interested parties could provide their views, and

provided an opportunity for such parties to submit pre-hearing and post-hearing briefs.

Plaintiff Sony, which is a domestic producer of CPTs and an importer of CPTs from Japan that were subject to the final affirmative LTFV determination, entered an appearance as a party to the Commission's investigation, but did not submit a pre-hearing brief or appear at the hearing. Sony did, however, subsequently submit a post-hearing brief in which it raised the arguments that: (a) its picture tubes constitute a separate like product or, alternatively, (b) its imported CPTs should be excluded from any affirmative injury determination because they occupy a "discrete and insular" market segment.

The Commission issued a final affirmative injury determination on December 22, 1987. 52 Fed. Reg. 49,209 (1987). The findings of the Commission were published in *Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore,* Inv. Nos. 731–TA–367–370 (Final), USITC Pub. 2046 (December 1987). With regard to the like product issue the Commission concluded "that there is one domestic product—all color picture tubes." *Id.* at 6. Accordingly, the Commission determined that there is one domestic industry, consisting of the six U.S. producers of CPTs. *Id.* Through its investigation the Commission concluded that the domestic industry had been materially injured and that the imported CPTs in question were the cause of this injury. Consequently, the Commission made a final affirmative injury determination. 52 Fed. Reg. 49, 209 (1987).

After the Commission issued its final determination Commerce issued an antidumping duty order on CPTs imported from Japan. 53 Fed. Reg. 430 (1988). The final antidumping duty margin applicable to plaintiff was the "all others" weighted average rate of 27.93 percent. 53 Fed. Reg. 430, 431 (1988).

Questions Presented

Plaintiff presents two questions for review. First, whether there is substantial evidence on the record to support the Commission's determination to include Sony's Trinitron color picture tube (Trinitron tube) in the like product finding with "all color picture tubes", instead of as a separate like product. Second, whether the Trinitron tube should have been excluded from the Commission's final affirmative injury determination on the grounds that it occupies a "discrete and insular segment of the market" not in competition with other CPTs.

Standard of Review

In reviewing challenges to administrative reviews this Court must sustain the agency's determination unless it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). *See*

Seattle Marine Fishing Supply Co. v. *U.S.*, 12 CIT ——, 679 F. Supp. 1119, 1125 (1988). Substantial evidence has been held to be more than a "mere scintilla", but sufficient to reasonably support a conclusion. *Ceramica Regiomontana, S.A.* v. *U.S.*, 10 CIT 399, 405, 636 F. Supp 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

Because a reviewing court must accord due weight to an agency's interpretation of a statute it administers, this Court will defer to the agency's interpretation, provided it is "sufficiently reasonable". *See American Lamb Co.* v. *U.S.*, 785 F.2d 994, 1001 (Fed. Cir. 1986). As stated in *Matsushita Electric Industrial Co., Ltd.* v. *U.S.*, 750 F.2d 927, 933 (Fed. Cir. 1984), "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

DISCUSSION

1. *Whether there is substantial evidence on the record to support ITC's determination to include Sony's Trinitron color picture tube in the like product finding with all color picture tubes, instead of as a separate like product.*

Under the antidumping statute the Commission is charged with determining the presence of a reasonable indication that

> (1) An industry in the United States—
>
> (A) is materially injured, or
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the administering authority * * * 19 U.S.C. § 1673b(a)(1) and (2) (1982).

"Industry" is defined in 19 U.S.C. § 1677(4)(A) (1982 and Supp. V 1987) as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." "Like product" is defined in turn as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation * * *." 19 U.S.C. § 1677(10) (1982). As indicated in the legislative history of the Trade Act Agreements of 1979, the like product standard should not be interpreted in "such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other." S. Rep. No. 96–249, 96th Cong., 1st Sess. 90–91 (1979).

In sum, the Commission "determines what domestic industry produces products like the one in the class defined by ITA and whether that industry is injured by the relevant imports." *Algoma Steel*

Corp., Ltd. v. *U.S.*, 12 CIT ——, 688 F. Supp 639, 644 (1988), *aff'd*, 865 F.2d 240 (CAFC 1989).

In the instant case the imported good with respect to which Commerce had made an affirmative determination was color picture tubes. Thus, in determining whether or not an industry in the U.S. was materially injured, or threatened thereby, the Commission had to consider what product in the U.S. is "like" the imported color picture tubes. In its determination the Commission concluded that there was only one like product; namely, all color picture tubes. Plaintiff argues that this determination is not supported by substantial evidence on the record, as Sony's Trinitron CPT is not "like" any other CPT.

Implicit in plaintiff's argument is that there are two CPT industries in the U.S., one consisting of Sony's Trinitron, the other consisting of all other domestic manufacturers of CPTs. Plaintiff argues that because the Trinitron tube utilizes a unique color picture tube technology and because the Trinitron tube is *not interchangeable* with other color picture tubes, the Trinitron does not perform the same function as other CPTs and is therefore not "like" other CPTs.

Defendant, and defendant-intervenor, on the other hand, argue that there is substantial evidence on the record to support the Commission's finding that all CPTs "have the same general appearance and the same end uses" and that all CPTs "generally share the same distribution process", and further, that "all picture tubes, regardless of size, are made of the same essential materials and perform the same function." (Defendant's Brief at 12; List 1, Doc. No. 201 at 5.) Defendant further argues that the similarities between all CPTs, including Sony's, "vastly outweigh" the differences asserted by plaintiff and that the Commission's conclusion was reasonable and is supported by substantial evidence on the record.

a.) *CPT Technology*

The record reflects that all CPTs subject to the investigation are cathode ray tubes that convert a video signal into a visual color display. (List 1, Doc. No. 126 at A–6.) The color display is produced by an electron gun which generates beams of electrons which are deflected onto the inside faceplate of the tube. (*Id.*) The inside faceplate is covered with red, blue, and green phosphor dots; light is created by the electron bombardment of those phosphor dots. (*Id.*) The intensity of the light is controlled by the video signal impressed on the gun, which in turn controls the number of electrons emitted. (*Id.*) This describes generally the essential common characteristics of all CPTs, including the Trinitron tube. The primary difference between the Trinitron and all other CPTs is in the color selecting mechanism, which allows an electron beam to strike only one of the red, blue, or green phosphor dots. (List 1, Doc. No. 161, at 13.) Most CPTs use a "shadow mask", a thin sheetmetal plate with thousands

of tiny slots. (*Id.*) The shadow mask is positioned behind the faceplate in such a fashion that the electron beams emitted by the electron gun pass through the slots at a precise angle so as to strike only one of the phosphor dot colors, while the other two are "shadowed". (*Id.* at 13, 14; List 1, Doc. No. 126 at A–6, A–7).

Sony uses an "aperture grille" rather than a shadow mask as its color selecting mechanism. (List 1, Doc. No. 161 at 14.) The aperture grille is a steel sheet with a series of continuous vertical slits which serve the same purpose as the slots in the shadow mask. Thus, the shadow mask and the aperture grille serve the same purpose and function; both are color selection mechanisms which channel the electron beams emitted by the electron gun to the phosphor dots located on the inside of the faceplate.

A second difference between the Trinitron and the conventional CPT is in the electron gun, referred to above. Whereas a CPT which uses a shadow mask uses three electron guns, each of which emits a separate beam, the Trinitron uses one electron gun to emit all three beams. (*Id.* at 11, 12.) Again, while it is clear that the use of one electron gun is different from the use of three guns, the fact remains that all CPTs require an electron gun(s) to generate electron beams.

The third asserted difference concerns the screen or faceplate, which is found on all CPTs. The faceplate is a thick glass plate which is attached to a "funnel" which forms the body of the CPT. Most CPTs have rounded corners and a convex faceplate. (*Id.* at 15.) Some have "full square" screens, with square corners and a nearly flat faceplate. (List 1, Doc. No. 126 at A–8 n.6.) The Trinitron tube has a cylindrically shaped faceplate. (List 1, Doc. No. 161 at 16.) However, the different shape of the faceplates does not outweigh the underlying similarities between the various screens, nor their common function, which is to display a color image.

b.) *CPT Manufacturing Process*

Plaintiff alleges certain differences in the production process of conventional CPTs as compared to the Trinitron, so as to make the Trinitron "unlike" other CPTs.

A CPT is constructed using four basic components: a faceplate, a shadow mask (or aperture grille in the Trinitron)[1], a funnel, and an electron gun. (List 1, Doc. No. 126 at A–9.) The faceplate is a thick glass plate which is designed to reduce radiation exposure to the viewer. The funnel is a glass casing which is bonded to a panel to form the body of the tube; it is designed to mate with the faceplate and to support the mounting of the electron gun. The electron gun is an assembly of stainless steel stampings (called grids) which emits beams of electrons that are magnetically deflected to scan the inside of the faceplate. (*Id.* at A–9, A–10.)

[1]The difference between the shadow mask and aperturn grille has been described above.

Plaintiff points to two differences in the production process of its CPT as compared to a conventional CPT.[2] The first is in the manufacture of the color selecting mechanism. This process begins usually with the production of the shadow mask, which involves the etching of thousands of slots or holes into a thin metal sheet. Once the mask has been etched it is annealed to a soft state and formed to fit the contour of the frame to which it is mounted so as to create the mask assembly. (*Id.*)

The Trinitron aperture grille is similarly produced from a metal sheet that is etched to form slits in the grille. The grille is then put under compression and assembled to a frame. After releasing the frame compression, the slits in the grille are kept rigid with high tension. This tension system is patented and is used in the production of only the Trinitron aperture grille. (List 1, Doc. No. 161 at 14, 15).

The second difference asserted by plaintiff involves the cathode design of the electron gun. The Trinitron uses a cathode design whereby the three cathodes are "unitized"—mounted on one ceramic disk. (*Id.* at 19.) In addition, the Trinitron electron gun incorporates a "divider" mechanism to divide the voltage between the high voltage needed to generate the electrons and the "convergence voltage" required to deflect the two side beams to the center of the screen. Plaintiff states that the conventional CPT does not require such a "divider". (*Id.*).

Defendant does not dispute the two differences cited by plaintiff and discussed above. However, defendant states that these differences "pale compared to the essential similarities" in the production process of all CPTs. (Defendant's brief at 20.) All CPTs, for example, use the same production process in the production of the faceplate. With respect to the color selecting mechanism defendant asserts that both are essentially metal screens in which light admitting openings are etched (slits in the aperture grille and slots in the shadow mask) and which are placed under pressure and attached to a frame. As for the manufacture of the electron gun, defendant states that the differences cited by plaintiff do not affect the essential similarity among all electron guns; namely, the inclusion of cathodes that emit electrons.

Plaintiff repeatedly asserts in its brief that the Trinitron tube is "unique" and that it is not interchangeable with other color picture tubes. As was discussed above, however, the fact that there are certain differences between the Trinitron tube and other CPTs does not mean that the Trinitron is not "like" other CPTs within the meaning of the relevant statutes. Nor is it disputed that the end use, i.e. television viewing sets, is the same for Trinitron CPTs as for other CPTs.

[2]Plaintiff does not assert any differences in the production process involving the faceplate or the funnel.

After a careful examination of the record the Court finds that there is substantial evidence in the record to support the Commission's determination to include the Trinitron color picture tube in the like product finding with all other picture tubes.

2. *Whether the Trinitron tube should have been excluded from the ITC's final affirmative injury determination on the grounds that it occupies a "discrete and insular segment of the market", not in competition with other CPTs.*

Plaintiff's second argument is that even if the Trinitron tube was properly included in the "like product" finding, it should have been excluded from the ITC's final affirmative injury determination since it avers the evidence on the record establishes that the Trinitron tube occupies a "discrete and insular segment of the market", not in competition with other color picture tubes. Plaintiff does not, however, cite any statutory basis, nor does it appear that it can, for this proposition.

The statute requires that the Commission make its determination by considering the imports for which Commerce has made a final affirmative determination of sales of less than fair value.

As noted above, the Commission, in making its injury determination, is required to consider the effect on the domestic industry of "imports, or sales (or the likelihood of sales) for importation, of *the merchandise with respect to which the administering authority has made an affirmative determination* * * * " 19 U.S.C. § 1673(b)(1) (1982 and Supp. V 1987) (emphasis added).

19 U.S.C. § 1673 (1982 and Supp. V 1987), provides:

> If—
>
> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of *that merchandise* or by reason of sales (or the likelihood of sales) of *that merchandise* for importation,
>
> then there shall be imposed an antidumping duty * * * (emphasis added).

Because Sony's imports were part of the class or kind of merchandise for which Commerce had made an affirmative determination, the Commission was required to include such imports in its injury investigation. As noted in *Algoma Steel Corp., Ltd.* v. *U.S.*, 12 CIT ——, 688 F. Supp. 639, 644 (1988), *aff'd*, 865 F.2d 240 (CAFC 1989), "in applying [19 U.S.C. § 1673] ITC does not look behind ITA's de-

termination as to which merchandise is in the class of merchandise sold at LTFV."

Plaintiff correctly states that ITC has authority to make "like product" determinations that are narrower in scope than Commerce's "class or kind" determination. *See Badger-Powhatan, Div. of Figgie Int'l, Inc.* v. *U.S.*, 9 CIT 213, 608 F. Supp. 653 (1985) (seven industries, two of which were injured, found to exist within one class or kind of merchandise). This point, however, is not relevant to plaintiff's assertion that the Trinitron CPT should be excluded from ITC's injury determination because it occupies a discrete and insular segment of the market. The fact is that the Commission determined that there is only one "like product"—and therefore one industry—within the class or kind of merchandise determined by Commerce to be sold at less than fair value. Once the Trinitron was found to be a "like product", the Commission could, and indeed was required by statute to, include it in its injury determination.

Plaintiff does point out, and defendant and defendant-intervenor recognize, that the Commission has in the past indicated that it has the authority in certain limited circumstances to provide an exclusion from its injury determination, although this position has not been asserted by the Commission since 1984. It is significant, however, that in the few cases in which the Commission did provide an exclusion, it was in the context of section 751b revocation investigations (19 U.S.C. § 1675(b)) where outstanding countervailing or antidumping duties were already in place. In *Synthetic L-Methionine from Japan*, Inv. No. 751–TA–4, USITC Pub. 1167 (July 1981), for example, the Commission considered the effect on the domestic industry of a partial revocation of an outstanding antidumping duty order. The Commission determined that no industry in the U.S. would be injured or was threatened with injury by reason of the imports in question, and so decided to modify the existing order so as to exclude synthetic L-methionine from Japan. *Id.* at 3. Importantly, however, the Commission stated that through its review of the record of the original investigation, it was convinced that the product in question was not within the scope of that investigation. *Id.* at 13 n. 35. Such is not the case in the instant action.

In *Salmon Gill Fish Netting of Manmade Fibers from Japan*, Inv. No. 751–TA–11, USITC Pub. 1921 (December 1986), the Commission decided to revoke a portion of an antidumping order concerning fish nets and netting of manmade fibers from Japan. Petitioners in that investigation sought the removal of duties from salmon gill fish netting rather than from all fish netting. As noted by the Commission, it was justified in limiting the scope of the investigation as "[s]ection 751(c) contemplates section 751 investigations that are more limited in scope than the order subject to review as it allows the administering authority to revoke a countervailing duty or antidumping order 'in whole or in part'." *Id.* at 9.

In sum, plaintiff can provide no statutory support for its request for its exclusion from the Commission's injury determination, nor can plaintiff cite any instance in which the Commission has done so in an original Title VII investigation.

CONCLUSION

For the foregoing reasons the Court denies plaintiff's motion for judgment on the agency record and affirms the Commission's final determination in *Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore*, 52 Fed. Reg. 49, 209 (1987).

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C89/57	Restani, J. April 11, 1989	Bowe Co.	84-4-00599	Item 355.25 12¢ per lb. + 15%, 10¢ per lb. + 14.6%, 8¢ per lb. + 14.2%, 6¢ per lb. + 13.8%, 4¢ per lb. + 13.3%, 2¢ per lb. + 12.9% or 12.5%
C89/58	Restani, J. April 13, 1989	Leather's Best Inc.	78-10-01775-S	Item 121.58, 121.59, 121.60 or 121.61 5%, 2%, or 1%
C89/59	DiCarlo, J. April 13, 1989	Pharmacia Inc.	85-3-00417	Merchandise classified under various provisions of schedule 4, or Item 711.88 Various rates or Item 708.29 Various rates
C89/60	DiCarlo, J. April 13, 1989	Sealed Air Corp.	86-5-00568	Item 405.80 1.4¢ per lb. + 16.2%
C89/61	DiCarlo, J. April 18, 1989	Paul Marshall Products, Inc.	88-3-00230	Item 386.04 28%

CATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
	Item 359.60 8.5%, 7.7%, 6.8% 6%, 5.1%, 4.3% or 3.4%	Bowe Co. v. U.S., Ct. No. 83-11-01590 (July 13, 1988)	Tampa Asphalt roofing product, etc.
	Item 121.60 or 121.65 Free of duty or 3.8%, 3.3%, 2.9% or 2.4%	Leather's Best Inc. v. U.S., Ct. No. 84-4-00504-S, 10 CIT 321 (1986)	New York Leather
	Item 799.00 Various rates Item 661.95 Various rates Item 712.49 Various rates	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438 (1985)	New York Separation media used in chromatography, electrophoresis, and centrifugation
	Item 409.18 6.9%	Sealed Air Corp. v. U.S., S.O. 88-38 (1988)	New York Polymeric isocyanates
	Item 386.50 9.3%	Agreed statement of facts	Los Angeles Baskets with textile linings

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	It
C89/62	DiCarlo, J. April 18, 1989	Leblond Makino Machine Tool Co.	87–12–01179	Merchandise denied duty-free entry since plaintiff had not met 35% foreign manufacturer requirement for GSP status	Fre C t n d s s i
C89/63	DiCarlo, J. April 18, 1989	Pharmacia, Inc.	85–8–01128	Item 711.88 Various rates Item 712.49 Various rates Schedule 4 Various provisions at various rates Item 799.00 Various rates Item 430.20 Various rates Item 437.76 Free of duty	Ite V I V I V I V I V I I
C89/64	Re, C.J. April 19, 1989	Algesco, Ltd.	83–3–00427	Item 700.95 12.5%	Ite 1
C89/65	Re, C.J. April 19, 1989	Belwith Int'l, Inc.	78–11–02015	Item 534.94 Various rates	Ite 7 V
C89/66	Re, C.J. April 19, 1989	Belwith Int'l, Inc.	87–4–00611	Item 534.94 Various rates	Ite 7 V
C89/67	Re, C.J. April 19, 1989	Jimlar Corp.	83–1–00166	Item 700.95 12.5%	Ite 8
C89/68	Re, C.J. April 19, 1989	Jimlar Corp.	83–2–00234	Item 700.95 12.5%	Ite 1 8

DECISIONS — Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
ree of duty under GSP–plaintiff tenered all necessary documentation supporting GSP states to Customs in timely fashion	Agreed statement of facts	Baltimore Lathes
em 661.95 Various rates Item 712.49 Various rates Item 713.09 Various rates Item 774.55 Various rates Item 799.00 Various rates Item 437.76 Free of duty	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438 (1985)	New York Columns, separation media, toxins or antitoxins
em 700.45 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Boston Women's joggers, etc.
em 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
em 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
em 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Boston Boy's sport shoes
em 700.45 10% Item 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Boston Women's or little gent's joggers

C89/69	DiCarlo, J. April 19, 1989	Pacific Trail Sportswear	87–1–00004	Item 379.31, 379.33, 379.95 379.96, 381.31 381.95, 383.22 383.23, 383.90, 384.23 or 384.91 Various rates	Item 376.5 10.6% or
C89/70	Musgrave, J. April 19, 1989	Topcon Instrument Corp. of America	86–6–00764	Additional duties were assessed upon the merchandise withdrawn from bonded warehouse for exportation	Merchandi subject t it was n entered commerc U.S.

56 or 9.1%	Agreed statement of facts	Seattle Man-made fiber outerwear apparel
dise is not to duty as never into the rce of the	Agreed statement of facts	New York Ophthalmic equipment

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V89/4	Restani, J. April 18, 1989	St. Paul Fire & Marine Insurance Co.	84-10-01338	Cost of production or constructed value	At an origi one-l betw valu
V89/5	Restani, J. April 18, 1989	St. Paul Fire & Marine Insurance Co.	84-10-01339	Cost of production or constructed value	At an origi one-l betw valu

N DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
amount equal to ginal entered values, plus -half of the difference ween original entered ues and appraised values	Agreed statement of facts	Cleveland Antenna cables and caps, DC 12v fractional horsepower motors, etc.
amount equal to ginal entered values, plus -half of the difference ween original entered ues and appraised values	Agreed statement of facts	Cleveland Antenna cables and caps, DC 12v fractional horsepower motors, etc.

R E M I N D E R

REJECTION OF PLEADINGS, MOTIONS OR OTHER PAPERS

The Clerk of the Court is required by USCIT R. 82(d) not to accept for filing any paper, or to return any paper which has been filed, which does not comply with the procedural requirements of the rules or practice of the Court.

The following are examples of some of the practices that will result in a notice of rejection from the Office of the Clerk and a return of the papers:

1. A pleading, motion, or other paper by facsimile transmission without prior permission of the Clerk (USCIT R. 5);
2. The failure to obtain a court number from Clerk's Office prior to the commencement of an action in which the plaintiff is required to make service of the summons (Appendix of Forms, Specific Instructions, Form 3);
3. A motion for an extension of time after the Court has granted a final extension of time;
4. A pleading, motion, or other paper with significant or substantial hand-written corrections made just prior to, at or after the time of filing;
5. A pleading, motion, or other paper without (a) a proposed order, (b) a certificate of service, or (c) the correct number of copies;
6. A pleading, motion, or other paper in an action where counsel has failed to properly notify the court of any change in the name of counsel of record, or counsel's address or phone number (USCIT R. 75(e)); and
7. A substitution of attorney without the requisite notification to the previous attorney (USCIT R. 75(c)).

Dated: April 28, 1989.

JOSEPH E. LOMBARDI,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 23, No. 21, May 24, 1989

U.S. Customs Service

Treasury Decisions

Customs Service Decisions

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Notice

☆U.S. G.P.O. 1989-241-040:80041

Index

Customs Bulletin and Decisions
[illegible]

U.S. Customs Service

Treasury Decisions

Customs Service Decisions

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Notice